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SUNSET OF THE CIVIL AERONAUTICS BOARD

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

SUNSET OF THE CIVIL AERONAUTICS BOARD

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SUNSET OF THE CIVIL AERONAUTICS BOARD

THURSDAY, JUNE 21, 1984

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON AVIATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room SR-253, Russell Senate Office Building, Hon. Nancy Kassebaum (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Stephen Johnson, professional staff member, Chuck Doyle, staff counsel, and Steve Palmer, minority staff counsel.

OPENING STATEMENT BY SENATOR KASSEBAUM

Senator KASSEBAUM. The hearing will come to order.

Our first witness is not here yet, but I believe we will go ahead and get started. Perhaps by the time the opening statements are finished and so forth, he will be here.

It is a pleasure to call this hearing this morning, because I believe it is important to have testimony on the record on this very important issue. The purpose of the hearing is to examine the question of what Government agency should receive airline consumer affairs authority when the Civil Aeronautics Board sunsets at the end of this year.

In order to keep things on track, I would appreciate it if everyone would restrict their comments to that question. I personally believe that the House and Congressman Mineta's effort have done us all a favor in producing a fine sunset bill, H.R. 5297. I do not believe it can be classified as reregulation in nature. More importantly it is free of extraneous amendments.

I will attempt to do the same thing on this side of the Hill. Although we may debate the specifics, such as consumer authority, I believe the case has been made for a sunset bill at this time. The Honorable James Miller, Chairman of the Federal Trade Commission, is on his way from the visitor's entrance. He is our first witness, so why do we not wait just a few minutes?

Senator Packwood, do you have any comments?

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. I can make a long enough opening statement to cover until he gets here.

This hearing is being held today at the specific request of the administration. Secretary Dole recently shared with me her concern about the future of consumer protection regulations when the CAB sunsets at the end of this year. Federal Trade Commission Chairman Jim Miller is also concerned. Together they hoped we could have a hearing on the subject of consumer protection.

I want to assure everyone here that I share Chairman Kassebaum's desire to pass a bill, and we will pass a bill. We will have a markup, get it out of this committee, we will get it on the Senate calendar, and we will pass it.

I hope it will be a clean bill. She and I are pledged to try to keep extraneous amendments off of this, and I think I can say for me—and my hunch is I can say for both of us—if there are some very adverse extraneous amendments passed that might relate to reregulation, I would have second thoughts about passing any bill at all.

As much as I want a sunset bill, and as much as I want to be done with this, it is not to be done at the price of some kind of back door reregulation, so Nancy, you have my pledge. We will have a markup. We will get it out of this committee. We will get it to the floor. Then you and I will talk with Howard about getting it out.

Senator **KASSEBAUM**. Thank you very much, Mr. Chairman. I certainly do appreciate that.

Senators Inouye and Exon have opening statments for the record.

[The statements follow:]

OPENING STATEMENT BY SENATOR INOUYE

As one who opposed airline deregulation at the outset for reasons which have since sadly materialized, I particularly welcome these hearings.

The Airline Deregulation Act of 1978 specifically transferred the major portion of the CAB's remaining authority to other agencies when the CAB sunsets at the end of this year. This includes authority over air carrier mergers, interlocking relationship and agreements, and the related authority to issue antitrust immunity. The 1978 act transfers this authority to the Department of Justice. H.R. 5297, would amend the law, however, and transfer it to the Department of Transportation.

Notwithstanding the transfer of some authority, the Airline Deregulation Act failed to deal specifically with the transfer of other authority which the board is now exercising, and which is not specifically terminated in 1985. Included in this category is the authority to protect consumers, to prevent unfair competition practices, and to find an air carrier "fit" before the carrier provides air transportation.

Whatever benefits airline deregulation has brought we know that the demands of competition have placed many carriers in a precarious financial situation, and created a real threat to the finest air transportation system in the world. The travelling public, of course, will be the loser if fares escalate and service deteriorates.

It is therefore especially important in my judgment that Congress act prudently in determining where to transfer the board's antitrust authority and its authority to protect consumer's and prevent unfair competitive practices.

OPENING STATEMENT BY SENATOR EXON

Madam Chairman, thank you very much.

It has now been nearly six years since the Congress acted to begin the gradual deregulation of the domestic airline industry. During those 6 years, we have seen most of the activities performed by the Civil Aeronautics Board either pared down or eliminated entirely.

We now face the final phase of this movement toward competition, that being the "sunset" of the Board itself. As we all know, the CAB will not longer be in existence on January 1, 1984. However, there will remain numerous important functions that will have to be continued in other Federal agencies to help ensure that the exceptional service now being provided by the airlines continues, and that those services are provided at the lowest possible costs.

Following the lead of our counterparts in the House of Representatives, we are today considering H.R. 5297, the Civil Aeronautics Board Sunset Act of 1984. Introduced by the aviation leaders in the House, H.R. 5297 amends the Airline Deregulation Act by transferring the remaining programs now administered by the CAB to the Department of Transportation.

This transfer includes, among other things, those consumer protection programs designed to cover domestic air transportation. These important programs, which affect smoking, baggage liability, compensated bumping and proposed rules on the airlines' computer reservation systems, will teminate without legislation. Before us today will be two sets of witnesses arguing the merits of sending these programs to either DOT, as proposed by H.R. 5297, or the Federal Trade Commission.

As for myself, I support the transfer to DOT. Such a move would keep the consumer protection programs for both domestic and internationai flights in one agency, and it would help ensure relatively quick and efficient action on future controversies in the airline industry. But these are arguments better left to the witnesses.

Before I finish my statement, however, I want to touch on one other area of special concern to me. While deregulation clearly has benefited many air travelers in this country, not all have been so lucky. There are many small and medium-sized communities that because of the near monopoly powers of individual airlines, have seen their fares increase more than can be justified. The people in these towns and cities have brought this problem to my attention, asking if it is fair that such discrimination occurs. They have asked what we, in the Congress, plan to do about this special problem, especially as we enter these last days of regulation.

I am bringing this up now to alert both my colleagues on the Committee, as well as the aviation representatives in the audience, that I believe this may be the time to address this issue. I want to find some way of allowing a community to prove that the fares it is being charged are unfair or unreasonable.

I do not want to re-regulate. But I am committed to finding a workable solution to a problem that is very real to so many communities.

Again, Madam Chairman, thank you very much.

Senator **Kassebaum**. It is a pleasure now to welcome James Miller, Chairman of the Federal Trade Commission.

Jim, I am sorry we went ahead. We wanted to be prompt, to show indeed that Senator Packwood and myself could be here until the wee hours of the morning and still get here at 9:30. So we even started early.

It is a pleasure to welcome you, and thank you.

STATEMENT OF HON. JAMES C. MILLER, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. **Miller**. Madam Chairman and Mr. Chairman, we appreciate this opportunity to present the unanimous views of the Federal Trade Commission on whether the CAB's consumer protection authority should be transferred to the Department of Transportation or the Federal Trade Commission, and also whether the DOT should receive certain antitrust authority now scheduled to go to the antitrust division.

As you probably know, I have been laboring in the vineyards of airline regulation for some time as has my colleague, Commissioner George W. Douglas of the Federal Trade Commission. We have also had, as you probably know, a number of Commission staff filings before regulatory agencies dealing with airline matters. And so we have considerable interest and, I think, have developed some expertise in the Federal Trade Commission on airline matters. While no specific legislation is being considered here, I would voice the Commission's general endorsement of Chairman Florio's House bill which, as you know, would essentially excise form the Federal Trade Commission Act the section 5 prohibition on the Federal

Trade Commission's having authority over air carriers, therefore giving the Commission jurisdiction over the airlines, transferring certain CAB rules, and finally, giving the Federal Trade Commission some informal rulemaking authority under section 553.

We are opposed, on the other hand, to Chairman Mineta's bill as recently approved by the full body, because, among other things, it essentially keeps many of the CAB's regulatory functions and structures alive within DOT.

Now, before I get into specific comments, let me emphasize the Commission strongly believes that an agency of the Federal Government should have the requisite authority and the capability to protect consumers of air transportation. It is also important to assure that the industry remains competitive, free of monopolistic practices.

I would like to address briefly both of these issues. It would seem to me the Commission is the logical choice for placing airline consumer protection authority. As I mentioned, we have expertise in airlines, but we also have expertise in a broad plethora of diverse industries in the American economy. We do not see anything so unique about airline service to render this general experience inapplicable.

Indeed, as you know, of the Federal Aviation Act section 411, is based on section 5 of the Federal Trade Commission Act. The choice of the Commission would also be appropriate for reasons of administrative efficiency. We employ a variety of enforcement mechanisms, and we can aid consumers promptly and effectively.

We also have so-called Magnuson-Moss rulemaking authority. As I will mention in a moment, perhaps we do need some informal rulemaking authority. However, we can apply remedies for violations of rules ranging from refunds and returns of property to civil damages.

We also have regional offices staffed with consumer protection specialists. These offices will be useful in collecting information from consumers. Airline passengers who felt they had problems would be able to address their problems directly to us through our regional offices.

As you know, Mr. Florio's bill would transfer the CAB's consumer protection rules to the Federal Trade Commission intact, and require they be maintained for a year. The bill would also give us expedited procedures under section 553 of the Adminstrative Procedure Act to update those rules, and to address new problems that might emerge with new rules.

I believe this is good, because the Magnuson-Moss procedures are sometimes very slow, and the airline industry is a very dynamic one. Problems may arise very quickly, and the flexibility as informal rulemaking would be very useful.

Our single disagreement with Chairman Florio's bill concerns the transfer of the authority over access by the handicapped to airline service. Similar authority has been held by agencies that fund or subsidize facilities, and we do not do that. For that reason, I think it would be better to have such authority reside with the Department of Transportation, which already has a comprehensive regulating scheme for assuming access by the handicapped to airport facilities.

Allow me to mention a few things about antitrust. We are very concerned about maintaining healthy competition in the industry. The whole dynamic of airline competition is enhanced by maintaining access by small entrepreneurs. Small firms provide competitive discipline. We have to maintain that.

Chairman Florio's bill, by removing the prohibition against FTC oversight over air carriers, would give us authority over unfair competitive methods of competition. That would enable us to join the Justice Department as enforcers of the antitrust laws over the airlines.

A particular example of an issue that is of concern to us is the computer reservation system. The smaller airlines have a legitimate beef. They feel there is bias in the reservation system displays against them. As you know, FTC staff participated in the CAB's proceeding dealing with CRS's. The staff, commented on the consumer protection aspects, but since the Justice Department was until the very last conducting an antitrust investigation did not comment on the competitive aspects of the CRS industry.

But I would like to make the point that the computer reservation system is very important in terms of how it affects competition. When the Board finishes its rulemaking proceeding, and if those rules are transferred to the Federal Trade Commission, I would anticipate fully enforcing those rules.

I know you have a number of witnesses, and I do not want to belabor the point, but just let me say that we think that it is important that the airlines be policed by the consumer protection and antitrust laws and enforcement mechanisms that all other industries are subject to. In the antitrust area, I am reminded of the great words of the Supreme Court in *Topco:* The antitrust laws "are as important to the preservation of economic freedom and our system of free enterprise as the Bill of Rights is to the protection of our fundamental personal freedoms."

So, Madame Chairman and Mr. Chairman, I hope that you will see fit in whatever decision you make to maintain consumer protection for air travelers, and also, very importantly, maintain antitrust liability for air carriers. Application of the antitrust laws will ensure that the competitive dynamic we have seen under deregulation continues.

Thank you very much.

Senator **Kassebaum**. Thank you, Chairman Miller.

We will have a few questions. I would like to ask you one. Have you examined at this point the staff at CAB and do you feel that if it is transferred over, given the expertise it has, to the FTC, it would be sufficient, or do you feel that you already have sufficient staff? I would assume not at this point with the aviation expertise.

Mr. **Miller**. There are something on the order of 15 people at the Civil Aeronautics Board engaged in consumer protection matters generally. Some of them are engaged in the essential air service program and international matters and might transfer to DOT. Our proposed budget contains the addition of seven people for airline consumer protection matters.

I am willing to look at that number very openly to see whether that would be sufficient. I think probably it would be, because some of our other resources at the FTC would be applied to airline matters, such as the regional offices.

Senator **Kassebaum**. One of the reasons I was curious as to if you have given any thought to how to handle this is, there has been some concern that if this moved, this responsibility moved to DOT, that you would have just a lateral transfer of the same personnel who had come from a regulatory bias and that it would be locked into place. I guess I do not see if indeed the same personnel are going to FTC that it necessarily reflects a regulatory bias, but more the expertise that comes from having worked in aviation matters.

Mr. **Miller**. I think the combination of the CAB staff's expertise on aviation matters with the FTC's consumer protection expertise will produce a synergism that is quite positive.

Senator **Kassebaum**. You mentioned administrative efficiency. One of the concerns that has been raised about consumer affairs and where they would arise is the need for rapid response to certain problems. I think this is particularly true in this area, given the changes that are taking place really quite rapidly, as you mentioned, certainly no reflection on or criticism of the FTC. I think you have done quite an outstanding job. But it has not been noted for rapid response.

I served on the Commerce Committee since I was elected in 1978, and some of the issues that we had before us then regarding the FTC are really ones that are still around in one form or another. How would you anticipate dealing with these particular issues in a different way? Because with the rulemaking authority that is involved in a wide range of areas, it places you, it seems to me, in a very different role than you have had before.

Mr. **Miller**. Madame Chairman, I think the key is in giving us section 553 informal rulemaking authority over airline matters. As you know, Magnuson-Moss proceedings are enormously protracted, although for good reason in many cases. But I think in the case of airlines, where you already have a body of regulation and you are mainly talking about making some modifications to those rules, informal rulemaking is appropriate. The Commission under section 553 could move quickly. Let me emphasize that we have many enforcement methods that do not employ rulemaking, such as injunctive relief, and in these individual cases we move very quickly.

Senator **Kassebaum**. One of the reasons, of course, that has been stated for the need to move it to FTC is the fear of reregulation that might come if it moved to DOT. What form do you see this constituting at DOT?

Mr. **Miller**. Madame Chairman, of course I have the highest admiration for the officials at DOT, and Secretary Dole, a former Commissioner of the Federal Trade Commission, who proves there is a life after FTC.

But think about it. Is it more likely that you are going to maintain a competitive environment for the airlines with a regulatory agency whose basic mission is nurturing and subsidizing transportation, and whose focus really is on transportation logistics or with an agency whose basic mission is competition and consumer protection?

As you may know, I once worked at the Department of Transportation, so I am not prejudiced between the two agencies, but I have a feeling that 20 years down the road it is much less likely that the airlines would be reregulated by ratcheting up on the regulatory controls if it is at the FTC than if it were at the DOT.

Senator **Kassebaum**. Thank you, Mr. Chairman.

The **Chairman**. Jim, is there any lack of logic in having part of the consumer protection function, namely, that which concerns international service, at the FTC? It seems to me it all ought to be one place or the other.

Mr. **Miller**. I think you are correct, Mr. Chairman. DOT's testimony, I understand, will make the point that the international part should go over to the FTC, and it could be facilitated very easily with a memorandum of understanding between the agencies.

The **Chairman**. So you would not be adverse to all of the consumer protection——

Mr. **Miller**. I agree with your point. I think it all ought to be at one place.

The **Chairman**. I have no other questions. Thank you.

Senator **Kassebaum**. Thank you very much, Chairman Miller. We appreciate it.

Mr. **Miller**. Thank you.

[The statement follows:]

STATEMENT OF HON. JAMES C. MILLER III, CHAIRMAN, FEDERAL TRADE COMMISSION

Madam Chairman and Members of the Subcommittee: I appreciate this opportunity to appear before you today. My purpose is to present the Federal Trade Commission's (FTC's) views on the relative merits of transferring consumer protection authority for airline passengers from the Civil Aeronautics Board—when the agency expires at the end of the year—to either the Commission or the Department of Transportation (DOT), and also on whether DOT should receive antitrust authority over commercial carriers, now scheduled to be transferred to the Department of Justice under terms of the Airline Deregulation Act of 1978.

I am especially pleased to be here today because reform of the airline industry has been of great interest to me over the years. As you may know, my fellow Commissioner, George W. Douglas, and I collaborated on a book about airline regulation that was published by the Brookings Institution in 1974.[1]

The Commisson has also been quite interested in airline regulation—especially the dynamic changes taking place in the industry since the passage of the 1978 act. For example, since 1978 the Commission's staff has participated in rulemakings before the CAB covering such topics as consumer protection rules for charters, competition as a determinant of domestic passenger fares, and liberalization of entry. Most recently the staff showed its deep interest in problems possibly caused by the operation of airline-owned computer reservation systems (CRS's) by filing comments in the CAB's rulemaking examining the issue. In addition, two Commission economists recently issued a study on the pressing problem of airport landing rights and their effects on competition.[2]

The Commission's continuing interest in the industry is also evident from recent Commission testimony on the CAB's competitive marketing decision [3] and on the general need for consumer protection regulation for airline passengers.[4]

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[1] George W. Douglas and James C. Miller III, Economic Regulation of Domestic Air Transport: Theory and Policy (Washington: The Brookings Institution, 1974).

[2] Donald Koran and Jonathan D. Ogur, Airport Access Problems: Lessons Learned from Slot Regulation by the FAA: An Economic Policy Analysis (Washington: Federal Trade Commission, 1983).

[3] Statement of James C. Miller III, Chairman, Federal Trade Commission, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation (July 26, 1983) on H.R. 2053, the proposed "Air Travelers Security Act of 1983."

[4] Statement of George W. Douglas, Commissioner, Federal Trade Commission, Before the House Subcommittee on Aviation, Committee on Public Works and Transportation, March 13, 1984.

While no specific legislation is being considered here today, let me put our position in perspective by noting that the Commission generally endorses H.R. 5507, a bill recently introduced by Rep. Florio, Chairman of our House Authorization Subcommittee. That bill is designed to amend the Federal Trade Commission Act to give the Commission authority over airline acts and practices currently regulated by the CAB. On the other hand, the Commission opposes H.R. 5297, the bill introduced by Rep. Mineta, Chairman of the House Subcommittee on Aviation of the Public Works and Transportation Committee, and recently approved by the full body. As you know, this bill would transfer consumer protection and antitrust authority from the CAB to DOT and essentially keep many of CAB's regulatory functions and structures alive within DOT.

Before getting to more specific comments, let me emphasize that the Commission strongly believes and agency of the Federal Government should have requisite authority and capability to protect consumers of air transportation and to ensure the industry remains competitive, free of monopolistic practices.

With your permission, I'd like now to discuss consumer protection and antitrust issues, in turn.

CONSUMER PROTECTION

Madam Chairman: As you know, there's been considerable controversy over whether the CAB's consumer protection authority should be transferred to DOT or to the Commission. Significantly, Secretary Dole, herself a former Commissioner, agrees that the FTC is best able to handle airline consumer protection matters. This is, of course, the position of the entire Administration.

The Commission would seem the logical choice for airline consumer protection authority. We have considerable expertise in addressing unfair or deceptive acts or practices in a plethora of diverse industries in the American economy. Moreover, there would appear to be nothing unique about the airline industry so as to render this experience inapplicable. Indeed, since the CAB's Section 411 authority is based on Section 5 of the FTC Act, we submit the FTC's experience and expertise to be directly applicable to protection of consumers of airline services.

The choice of the Commission would also seem appropriate for reasons of administrative efficiency. We employ a variety of enforcement mechanisms that would aid the consumer promptly and satisfactorily. Our professional staff is well versed in obtaining such relief as injunctions, cease and desist orders, and civil penalties. Although I shall have more to say on this momentarily, I should note that the Commission can also issue trade rules where relief in individual cases is not adequate. Remedies for violations of such trade rules include rescisison or reformation of contracts, refunds and return of property, as well as payment of damages and civil penalties by rule violators.

Further, the FTC complements its legal staff with consumer protection specialists based throughout our regional office system. These specialists receive complaints and provide direct assistance, facilitate resolution of disputes, and launch further investigation of systematic problems. We believe our regional office system provide an especially good radar net for industry problems that might become chronic.

As I stated before, we endorse the approach proffered by Chairman Florio. His bill would give the FTC specific authority to regulate smoking aboard aircraft.[5] Mr. Florio's bill would also transfer the CAB's consumer protection rules to the Commission intact and require that they remain in place until December 31, 1985. After that date the Commission would be allowed to use informal rulemaking procedures under the Administrative Procedures Act to amend these rules. And, using the same informal procedures, the Commission would be able to adopt new rules, should conditions warrant.

We agree with this approach. While the thorough Magnuson-Moss rulemaking procedures normally used by the Commission are appropriate for most situations, the procedures are rather lengthy. The airline industry is so dynamic that quicker procedures would appear to be necessary, at least on a trial basis. For example, the problems we see today with CRS's were not even envisioned by most experts just a few years ago.

Our single disagreement with H.R. 5507 concerns regulatory authority over access to airplanes by the handicapped. DOT presently has authority over a variety of matters involvling access by the handicapped, such as access to terminals. We believe it would be more logical for DOT to handle problems associated with access to the air service itself, for it is inextricably linked to facility access.

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[5] It would be appropriate, however, to indicate in the legislative history that Congress intends that the Commission's powers over regulation of smoking extend only to travel on airlines, not smoking in public places in general.

ANTITRUST

The Commission is also concerned with the maintenance of healthy competition within the airline industry. Chairman Florio's bill (H.R. 5507), by removing the air carrier exception from Section 5 of the FTC Act, would also give us authority to address problems arising out of unfair methods of competition within the industry. Moreover, H.R. 5507 would be specifically delegate to us the enforcement of whatever rules the CAB adopts in its CRS rulemaking.

Some have asked me why the Commission did not participate more extensively in the CRS proceeding. Our staff did file comments at an initial stage, but confined its comments to consumer protection issues in deference to the Department of Justice's antitrust investigation in this area.[6]

Later, when it appeared the Commission might eventually obtain jurisdiction over the matter, it appeared propitious that our staff not participate further. Obviously, if the Commission received jurisdiction with the rulemaking incomplete, questions of prejudgment could be raised. And, if we were required to defend CRS rules adopted by the CAB in court, even minor differences between our interpretations and those of the CAB might have placed us in a difficult or untenable position.

I can state, based on preliminary analysis, that our staff did find troubling aspects of airline-owned computer reservation systems. The staff concluded regarding one such aspect that current CRS technology gives carriers owning CRS's the capability to make rapid selective changes in display screen bias that could deter entry into air service and inhibit aggressive price competition.

For example, if a rapid increase in display screen bias were used against a rival, it might have the effect of "disciplining" the competitor and thus harming competition. Especially troublesome is the possibility that bias could be increased on all of a rival's routes, leading to a revenue decrease in the short run that would cause a previously profitable entry or pricing decision to become unprofitable. In other words, if a rival decided to compete aggressively against an airline that ran the CRS, the more flights the rival had on the CRS the more revenue that could be taken away.

As you know, the success of airline deregulation has been due in substantial measure to the role of new entrants and other small carriers in making sure rates, routes, and services are determined by competitive market forces. This competitive dynamic must be preserved.

Of course, I do not mean to prejudge any of the issues raised in the CAB's proceeding. But I did want to go through this hypothetical by way of explaining why we take the CRS question very seriously. You can be assured that if the CAB adopts rules that are transferred to the Commission, we will enforce them vigorously.

The Commission has great problems with H.R. 5297, which recently passed the House, and which would transfer to DOT the CAB's present authority to approve mergers, interlocks and agreements, as well as the authority to grant antitrust immunity to these transactions in appropriate cases. At present such authority would transfer to the Department of Justice under the Airline Deregulation Act of 1978.

It is vital that Congress take steps to ensure that the airlines, along with every other industry, are subject to effective antitrust scrutiny. I remain convinced we should not create any implied exceptions from the antitrust laws through means of relaxed enforcement. I am reminded of the great words of the Supreme Court in Topco: The antitrust laws "are as important to the preservation of economic freedom and our system of free enterprise as the Bill of Rights is to the protection of our fundamental personal freedoms." [7]

Chairman Mineta has argued for the transfer of antitrust authority to DOT because of DOT's expertise in airline matters and because DOT would be able to balance the transportation benefits provided against the possible anticompetitive effects allowed.[8] I respectfully submit that this line of reasoning is wrong on two counts.

First, I see nothing unique about the nature of competition and potentially monopolistic practices in the airline industry. Certainly there is little about this industry that isn't encountered by Justice's elite corps of antitrust enforcers in a variety of other service industries. And, it should be noted, the Department already has considerable expertise on airline antitrust matters, reflecting its active participation in CAB proceedings, over the past decade.

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[6] See Comments of the Bureaus of Competition, Consumer Protection, and Economics, submitted in CAB Docket No. 41686 (November 17, 1983), n. 2.

[7] *U.S.* v. *Topco Associates*, 405 U.S. 596, 610 (1972).

[8] Congressional Record (June 5, 1984), p. H5239.

Second, Chairman Mineta's statement implies that antitrust enforcement ignores public interest benefits. This is not our understanding of antitrust law and how it is applied. For example, the Supreme Court has often observed that it is only after considerable experience with certain business relationships that courts classify them as per se violations.[9] Most questions of business conduct are judged under a rule of reason, which assesses their net competitive impacts.

In our opinion, those who believe antitrust enforcement and deregulation are incompatible are mistaken. Instead, they are necessary complements. For deregulation to have its desired effects, antitrust enforcement must be strong to prevent monopolistic practices that harm consumers and restrain opportunities for efficient, honest entrepreneurs.

I realize, of course, there is some apprehension that certain desirable business relationships or practices within the industry could not work under deregulation without some type of antitrust immunity. But I want to assure those who are apprehensive by noting that a great variety of industries directly subject to the antitrust laws engage in similar kinds of complicated relationships and practices. And they and their arrangements survive quite well without antitrust immunity.[10]

CONCLUDING REMARKS

Madam Chairman and Members of the Committee: In sum, we ask you to focus on the issue of agency capability. There is no question that consumer welfare in this industry is best served by lively competition among the airlines. We at the Commission believe our agency is the best choice to pursue this goal in the long run for institutional and efficiency reasons.

We also implore you to crown the success of airline deregulation by altering the Airline Deregulation Act as little as possible. My own personal belief is that while the decision over which agency (or agencies) receive(s) consumer protection and antitrust authority is an important one, of far greater significance is whether the promise of the 1978 Act is to be fulfilled, or whether the undesirable vestiges of economic regulation are to be preserved, to live another day.

Madam Chairman and Members of the Committee: That completes my prepared statement. I shall be happy to address any questions you might have.

Attachment.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

I agree with Chairman Miller and Secretary Dole that the FTC is the appropriate agency to continue the consumer protection functions of the CAB after January 1, 1985. The legislation introduced in the House by Congressman Florio, H.R. 5507, accomplishes this goal and I am pleased that the Commission has endorsed that bill.

Under this approach, the CAB rules with respect to denied boarding compensation, baggage practices, charter trips, conditions of carriage, computer reservation systems, and smoking on aircraft would be enforced by the FTC. No change could be made in these rules for one year. I differ with Chairman Miller only in that I support transfer to the FTC of the CAB's rules forbidding discrimination against the handicapped. This will centralize in one agency—the FTC—all rules protecting airline passengers.

Senator KASSEBAUM. Our next witness is the Honorable Matthew V. Scocozza, Assistant Secretary for Policy and International Affairs, Department of Transportation.

It is a pleasure to welcome you this morning, Mr. Scocozza, on the other side of the table testifying. I almost feel like we have Mr. Deregulation here himself, having advised us through many difficult regulatory issues here in the Commerce Committee, and I cannot for the life of me imagine the fear anyone would have about DOT reregulating the airline industry with you sitting over there.

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[9] See, for example, Topco Associates, supra, at 607-608; Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982); and Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8 (1979).

[10] For example, the trucking industry is gradually losing its antitrust immunity and seems to have suffered no ill effects.

It is a pleasure to welcome you.

STATEMENT OF MATTHEW V. SCOCOZZA, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, DEPARTMENT OF TRANSPORTATION

Mr. SCOCOZZA. It is good to be here. Some of the happiest years of my career were spent here, and I will never forget them.

Madam Chairman, I appreciate the opportunity to appear before you to discuss the impending sunset of the Civil Aeronautics Board after a more than 40 year regulatory life. I understand that you desire to limit this hearing to consumer protection matters.

For that reason, I would like to offer for the record a more comprehensive statement of the Department's position, which summarizes the basic features of our plan for administering CAB functions after sunset and details the Department's position on all aspects of the CAB sunset bill, H.R. 5297, sent to you by the House.

Before turning to consumer protection matters, however, I believe it important to indicate that DOT feels strongly that the committee should not report out any bill that contains other than clarifying language to the transfer provisions of the Airline Deregulation Act.

Of particular concern to us are the provisions in H.R. 5297 which would, No. 1, shift antitrust authority from the Department of Justice to DOT. No. 2, retain a domestic fitness certification requirement. No. 3, mandate the collection of certain airline data while prohibiting the collection of certain other data. No. 4, shift section 411, unfair trade practices authority, and the safe and adequate consumer authority under section 404(a) to DOT.

In our view, these various provisions when taken together have a real potential to facilitate a reregulatory agenda at some point in the future, although I know such an outcome would be contrary to the thinking of this committee, and of the House committee which authored H.R. 5297.

The CAB's international consumer authority in the Federal Aviation Act will transfer to DOT under the terms of the ADA. While the CAB section 411 domestic consumer protection authority does not transfer, we believe that the FTC would be capable of undertaking domestic consumer protection regulation of air carriers in all areas currently regulated by the CAB pursuant to section 411. Such authority would pertain to questions of unfair advertising, baggage liability, bonding, and escrow for charter operations as well as the current rulemaking on computer reservation systems.

Finally, DOT's legal analysis concludes that the CAB section 404(a) safe and adequate consumer protection authority lapses when the CAB is abolished at the end of this year. We realize there is a great deal of concern regarding the consumer issue, and some trepidation that the airline industry will not be able to continue to conduct business in the future as effectively as in the past without continuation of the special supervisory role that the CAB has exercised. We do not agree with this view.

Oversight of unfair trade practices in this country is, with few exceptions, exercised by the Federal Trade Commission. The present-day maturity and competitiveness of the airline industry removes any rationale for treating it differently from other industries by consolidating regulatory authority, including consumer protection, into a single agency.

Moreover, we realize that much of the concern being expressed about the proper place to locate the CAB's consumer protection authority stems from concerns of carriers rather than a concern about consumers. This motivation grows from a carrier concern that the CAB's current rulemaking—a fair trade matter—should not be neglected or abandoned after sunset. The DOT believes that the FTC is not only expert on such trade practice matters, but would provide excellent leadership on this issue after sunset. Chairman Miller, speaking for the Commission, has already appeared before you and spelled out FTC's plans and competency in this area.

Notwithstanding our conviction that additional legislation is unnecessary to complete the sunset of the CAB and provide for the transfer of its residual functions, Secretary Dole stated earlier that DOT would not object to clarifying legislation to make explicit the transfer of consumer authority from CAB to FTC. This can be accomplished by simply removing the present bar to FTC jurisdiction that appears in section 5(a) of the FTC act. Also, we have not opposed transferring CAB's consumer regulations directly to the FTC by statute. Nor have we opposed authorizing simplified procedures for handling aviation consumer protection rulemaking rather than the more complicated Magnuson-Moss procedures normally applicable to FTC rulemaking. By waiving the Magnuson-Moss procedures, Congress would not merely be placing the aviation industry and its consumers on a par with comparable industries, but giving them a more expeditious rulemaking procedure.

Finally, there has been a concern that a split in consumer protection authority would result from our sunset plan because DOT would succeed to CAB's 411 authority in foreign air transportation when we inherit CAB's international oversight rule, while the FTC would exercise that authority in connection with domestic aviation. In fact, DOT expects to exercise its 411 authority in the context of reviewing tariffs filed for foreign air transportation. Regarding consumer protection regulations in the international area, we have come to the conclusion that the department should defer to the FTC under a memorandum of understanding or other administrative arrangement so that there is conformity between DOT's and FTC's approaches to consumer protection. If, however, Congress decides that it is necessary to consolidate all consumer protection in one agency, Secretary Dole has testified before the House—and we reiterate now—that she believes the FTC is the appropriate place for such a consolidation, not DOT.

Another consumer issue which has also raised concerns is the use of section 404 authority to regulate smoking on commercial air carriers. As I indicated, it is our opinion that section 404 safe and adequate authority will expire on sunset of the CAB. We do not believe, however, that the absence of Federal smoking regulations will be a problem. The majority of airline passengers regularly state a preference to be seated in a nonsmoking area of the plane. I am confident that the airlines will continue to honor this preference by maintaining separate areas for smokers and nonsmokers.

Section 404 is also the basis for the CAB's rules protecting the rights of the handicapped in air travel. This is an extremely important matter which Congress has made clear should not be entrusted entirely to the marketplace. The lapse of section 404 will not leave DOT without the ability to continue regulatory protection for the handicapped. We have adequate authority through section 504 of the Rehabilitation Act of 1973 and grants made under our Airport Improvement Program to assure that airlines afford the handicapped nondiscriminatory and safe access to air travel. We are currently exploring the need for rulemaking to establish specific and clearcut requirements in this area.

Let me close by offering any assistance we can to the committee, including drafting assistance to implement the current Airline Deregulation Act. We appreciate the opportunity to be heard on this critical matter, and I am ready to respond to any questions the committee has at this time.

Senator KASSEBAUM. Thank you very much.

I would like to ask you first one of the questions I asked Chairman Miller. The fear of transferring consumer protection responsibilities to DOT is that it would ultimately lead to reregulation. In what way? How do you feel this might happen? Chairman Miller believed there was just an institutional bias there, perhaps given that different direction that a large department such as the Department of Transportation has versus FTC, whose main focus is consumer protection.

Mr. SCOCOZZA. Our primary the concern, Senator, is not that it may lead to reregulation in the consumer area, but rather that if all the aviation functions are in one place, it will be very easy to create a modal administration at a later date. And that would be tantamount to recreating the CAB.

The Department of Transportation has maintained that the regulatory oversight for unfair or deceptive trade practices in the airline industry is more appropriately placed with the agency that has the mandate from Congress to perform that function for most other service industries. Our rationale is to put all authority over unfair or deceptive trade practices together in one compact place.

Senator KASSEBAUM. It seemed to me, though, that one of our guidelines here should be efficiency. That is what we are really ultimately trying to get at here, many times not terribly successfully, but I find that the more we splinter responsibility, the less efficient it really tends to become.

True, we are phasing out the Civil Aeronautics Board largely because many of the responsibilities that it had under regulation have gone, but there are some, and we all recognize the necessity for and the need to maintain some responsibility there. The consumer area is a broad one, anywhere from baggage liability responsibility to the computer reservation system, for instance.

It is truly a wide swath that is cut there, but one thing that I find, many people who work in particular areas dealing with aviation become very confused about where they are supposed to go.

You might argue that keeping it all in one place lends to efforts perhaps to move it back into a regulatory mode at some point.

I would argue that what is necessary is efficient personnel, not necessarily large numbers, and an effort to keep in mind the intent of the whole effort. It does not make a lot of difference where it is. It is the people that will be involved. I think we are talking about the same people to a certain extent in staffing. Is that not right?

I mean, they will move from CAB evidently either to DOT or FTC, but FTC, it seems to me, in the past, at least, has not had the rulemaking mechanisms. I just really question whether taking on this broad rulemaking authority will add to an efficient handling of aviation issues. That is my concern.

I think consumer protection will exist whether it is at DOT or FTC, but how we can make it work most efficiently with skilled personnel it seems to me is the question.

Mr. Scocozza. The point you are making, Senator, is valid, but I think the problem is that the number of people who are working on consumer regulations is very small. I do not have the exact numbers, but I believe the number of CAB consumer staff employed for this purpose is less than 15 people. Am I correct in that? Mr. Vance Fort is in the audience and has worked a great deal in this particular area.

So, in terms of experienced consumer professionals, we are talking about less than 15 people. When the CAB gets into a consumer exercise, the whole agency has to be involved to give those 15 people the backup they need to do their job.

If the function were located in DOT, it means that staff resources might have to be pulled from other important operational activities, whereas if the function is located in the FTC there would be a sufficient regulatory staff.

It seems logical that it would be more productive for those 15 people to be drawing on an agency whose mandate is consumer protection, rather than taking people from other areas to provide support. So the numbers of people are actually very small, but it is a fact that in the agency whose full-time responsibility is consumer protection, the quality of support, would actually be appreciably better.

I do not mean to suggest that the Department of Transportation could not perform capably. It is just that when we are doing, let us say, domestic and international baggage handling, which may involve international negotiators as well as domestic people on certification, someone will have to put something aside.

If you tally the results at the end of the day, I think the personnel at the CAB who have a responsibility in domestic fitness certifications might show that they have been working on a smoking regulation, or an international negotiator might show on his or her portfolio that they have worked on a smoking regulation, when they really should have been spending full-time in their major area of expertise. I add that for your consideration.

I appreciate what you are saying, but I think those 15 people could draw on more immediate support from an agency whose mandate is consumer protection as opposed to the diverse responsibilities exercised by Transportation.

Senator **Kassebaum**. I think that is a good point. I guess I still wonder if the FTC is meant to do this kind of large effort. I mean, they have jumped in in a big way now in oil mergers.

Who would have thought, from the days we argued about the used car dealers and funeral directors, that we would now have moved to mergers, large merger operations in the oil industry, into a major discussion of significant involvement in the aviation industry.

Despite what many say, I think the CRS issue is very much a part of this debate. CAB has taken some tentative steps towards some decisions, which I guess they may issue a rule on that, although it has not been done yet, I believe. But they are contemplating this.

If the CAB does take a step in addressing this, what will happen to that? What do you envision happening to that? Will it simply fall by the wayside if moved into the FTC and DOT? Will this come up for re-examination?

Mr. **Scocozza**. Senator Kassebaum, you are as knowledgeable about the aviation industry as anyone. I think we are lucky to have such a fine and sophisticated aviation industry. I have traveled all over the world and I think ours is the best.

There is no way anything that pertains to this industry can fall by the wayside without the affected parties walking the halls of this chamber, the House of Representatives, and beating the doors down in every Executive branch agency. So I have full confidence that if the Federal Trade Commission did not give the aviation industry the amount of attention that it must have, the proper people would certainly know about it, and I think Congress would move swiftly to ensure that the Federal Trade Commission, in an oversight hearing, admits to the fact that they might not be fulfilling their mandate.

I cannot foresee that ever happening because the level of sophistication in the aviation industry is so high. The level of professionals in this city working in the aviation industry are of such a caliber, that there is no way an industry like that could be neglected by any agency.

Senator **Kassebaum**. Thank you very much. A very diplomatic and astute answer.

Mr. Chairman.

The **Chairman**. I think it is fair to say that the administration is not overly enthusiastic about any bill at all, is that not true?

Mr. **Scocozza**. Right.

The **Chairman**. I have talked with a number of people in the administration. They prefer no bill. However, if there is to be any bill, they want a clean bill with no reregulation on it.

What do you think would be the administration's attitude toward this bill, which they are not enthusiastic about anyway, if we were to add something like guaranteeing antitrust immunity for travel agents?

Mr. **Scocozza**. I think we would probably have some problems, Mr. Chairman.

The **Chairman**. I am not suggesting doing that. I do not support that at all. All I am saying is, this bill has a tenuous future, if and when it gets out of Congress, whether the administration accepts it.

Mr. SCOCOZZA. Exactly.

The CHAIRMAN. If we add anything to it like that, my hunch is we would just be guaranteeing a veto.

Mr. SCOCOZZA. I think that is accurate. A veto would certainly be a subject for discussion if we got into areas like that.

The CHAIRMAN. One other area I am curious about. Over the years the Department of Transportation has changed its mind about where antitrust authority should go. What is the reason for the change?

Mr. SCOCOZZA. Senator, I wish I were back on the committee and we could just have an informal conversation about that.

I think the best way to answer that is by noting exactly what we are trying to accomplish, and for us sunset meaning sunset. It does not mean transfer.

For all intents and purposes, what this committee and the House counterparts have done time and time again—for the trucking industry, the railroad industry, and the aviation industry—was to recognize that two fundamental things had to occur for deregulation to be meaningful.

No. 1, pricing regulation and antitrust immunity had to diminish in some way, shape or form.

The other thing is free entry. Well, entry has been accomplished although in the international area, we have to recognize that it cannot be completely accomplished.

As to antitrust immunity, if it is not done away with—as we are hoping will be done eventually in the trucking area—it must at least be diminished, and if not diminished at least separated. Separate the regulators from antitrust immunity.

Let's face facts, the Department of Transportation will be regulating. For example, we will be reviewing international fares. I do not like to say those things, but there are some continuing aviation regulatory functions. We are going to have an Office of Regulation in the Office of the Secretary that will exercise certain residual regulatory matters responsibilities.

The CHAIRMAN. You mean that with or without this bill you are going to have such an office?

Mr. SCOCOZZA. With or without this bill. Under the ADA of 1978, there are some regulatory responsibilities that we will take, for example regulations to ensure access for the handicapped. There will be some regulatory functions at DOT.

If you have the whole corpus together, regulation and antitrust immunity, there is a much greater susceptibility to having the CAB come back together. While I certainly do not think anything like this is going to happen in the near future, that possibility cannot be precluded over the longer term.

I think a fundamental issue that was appreciated in 1978 was the need to separate the residual regulatory functions from antitrust immunity, and I think it is a realization the Department of Transportation fully appreciated after it took a second hard look at sunset.

It obviously would have been so much easier, Mr. Chairman, to have picked the Board up and put it down in DOT and send a modified budget to the Hill. The divestiture of functions is a lot harder. It is a great deal more difficult, and not the easiest way out. But we think it is the most responsible way to proceed.

The CHAIRMAN. What is the Department's position on the Federal Trade Commission's power to prohibit unfair and deceptive practices? Even if the Mineta bill were to pass, transferring authority to DOT, what is your position on the authority which would remain with the FTC to prohibit unfair and deceptive practices?

Mr. SCOCOZZA. Well, in that case—assuming the passage of the Mineta bill—the airline prohibition would remain in the Federal Trade Commission Act, so there really would not be any type of duplicative responsibility at the Federal Trade Commission.

The CHAIRMAN. So your position is that section 5 is a bar?

Mr. SCOCOZZA. In the absence of lelgislation such as you suggest, legislative history and our General Counsel's legal memo substantiate that there is a way without legislation that the Federal Trade Commission could assume the responsibilities, consumer responsibilities. Of course, it is not guaranteed against court attack.

The CHAIRMAN. Oh, I am quite sure there would be court attack.

Mr. SCOCOZZA. I am sure there would be. At least from the aviation industry.

The CHAIRMAN. Well, it just invites it when you leave that kind of ambiguity.

Mr. SCOCOZZA. Sure, right.

The CHAIRMAN. Sooner or later somebody is going to test it.

I have no other questions, Madam Chairman.

Senator KASSEBAUM. I do not, either.

Thank you very much, Mr. Scocozza.

Mr. SCOCOZZA. Thank you for having the Department here.

The CHAIRMAN. Good to have you back.

Mr. SCOCOZZA. It is nice to be back.

[The statement follows:]

STATEMENT OF MATTHEW V. SCOCOZZA, ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS

Madam Chairman and Members of the Subcommittee: I appreciate this opportunity to appear before you today to discuss the impending sunset of the Civil Aeronautics Board after a more than 40-year regulatory life. As you and the Members of the Committee know, DOT does not believe this Committee should report out any bill that contains changes to the transfer provisions of the 1978 Airline Deregulation Act (ADA). We would like to set forth our reasons for proceeding with the sunset of the CAB without enacting legislation beyond any that might be desired to clarify the transfer of functions to other agencies.

I understand that you desire to limit this hearing to consumer protection matters, but I would like to take this opportunity to summarize the basic features of the Department's plan for CAB sunset and briefly set forth, for the written record, the Department's position on all aspects of the CAB sunset bill, H.R. 5297, sent to you by the House.

The Department's plan for administering CAB functions after sunset is as follows:

"The CAB's international aviation authority, the Essential Air Service Program, and employee protection determinations [1] will transfer to DOT on January 1, 1985, as explicitly provided in the ADA.

"Also on January 1, 1985, the CAB's antitrust functions will transfer to the Department of Justice, and the CAB's domestic airmail rate authority will transfer to the U.S. Postal Service, as explicitly provided for in the ADA.

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[1] Employee protection responsibilities subject to U.S. District Court decision of May 17, 1984 (No. 84-0485).

"Other CAB functions—domestic airline economic fitness certification, information and assistance to consumers, and airline data collection—were not provided for by the ADA, but DOT has ample authority under other legislation to assure continued airline fitness for safety purposes, to provide information and assistance to consumers, and to collect aviation data.

"By operation of law, the CAB's international authority under section 411 of the Federal Aviation Act (FAAct) will transfer to DOT. The CAB's domestic consumer protection authority will not transfer to DOT. We believe, however, that the Federal Trade Commission (FTC) will be able to regulate air carriers involved in domestic and international transportation in all consumer protection matters currently regulated by the CAB under its section 411 authority, such as unfair advertising, baggage liability, bonding and escrow for charter operations, and the current rulemaking on computer reservation systems."

We are pleased that the House bill, H.R. 5297, would not change the Department's organizational plan for handling CAB functions. Nor does the House bill go beyond existing statutory protections for the Department's formal decisionmaking process after CAB sunset. On the other hand, H.R. 5297 would substantially revise the jurisdictional arrangement of current sunset law and assign most of the CAB's residual functions to our Department, with the modest exception of most domestic postal matters. Specifically, the House bill would change the jurisdictional arrangement established by the ADA, as follows:

"Authority to approve mergers and agreements and to grant antitrust immunity (sections 408, 409, 412, 414), both in foreign and domestic air transportation, would transfer to DOT rather than to the Department of Justice. However, the domestic authority would lapse January 1, 1989.

"The consumer protection authority relating to 'unfair or deceptive' trace practices under section 411 would transfer to DOT. The authority to require airlines to provide 'safe and adequate' air transportation under section 404(a) would transfer to DOT rather than lapse.

"The domestic economic 'fitness' requirement (section 401) would transfer to DOT rather than lapsing."

Moreover, the House bill includes:

"A provision that explicitly authorizes the transfer of those CAB personnel, including SES personnel, who are associated with the transferring functions.

"A standard savings provision that preserves, until changed, all existing CAB rulings and all pending proceedings.

"A provision that mandates the collection of specified types of airline data and prohibits the collection of certain other data.

"A provision transferring to DOT the CAB's authority to require liability insurance for domestic carriers.

"A provision for the continuation of airmail rate regulation in Alaska, notwithstanding the ADA's provisions for competitive bidding for the carriage of airmail in the remainder of the U.S.

"Numerous provisions involving technical corrections to the Federal Aviation Act and to other statutes substituting DOT or the Postal Service for the CAB, or eliminating obsolete references altogether."

In our view, various provisions of the House bill, when taken together, have a real potential to facilitate a reregulatory agenda at some point in the future, although I know such an outcome would be contrary to the thinking of this Committee or the House Committee which wrote H.R. 5297. Let me cite just a couple of reasons why we take this threat seriously.

Despite a general consensus that having to obtain a government license on the basis of "economic suitability" to conduct business is a relic of bygone times, the House bill would preserve the requirement that airlines obtain section 401 fitness certificates as a prerequisite to providing service. The proponents of economic fitness have not argued that this is a safety issue, and I assure you that the safety fitness of new entrants and established carriers is and will continue to be given rigorous scrutiny by FAA. Nor should continued economic fitness be considered as a consumer protection issue, because there will be adequate authority under Section 411 and the FTC's section 5(a) authority to police against consumer abuses by new entrants.

What is at issue is whether we should retain an economic fitness standard which, in the future, could serve as a foundation for any reregulatory agenda that proves temporarily appealing. Unless the economic fitness provisions are eliminated, this is precisely what could happen, and DOT at a future time could end up giving renewed force and effect to this antiquated barrier to entry. In fact, some have already begun to criticize the CAB for tightening the existing fitness standards, and subjecting potential new entrants to lengthy, costly proceedings and cumbersome economic speculations as to management ability and adequacy of financial plans.

Another example of the continuing threat to airline deregulation is the possibility that a Senate amendment to the House bill that would continue and transfer to DOT section 404(b) authority may be offered in order to reestablish the prohibition on "discriminatory" domestic fares. We realize that air travelers on relatively low-density routes or short flights consider it unjust to pay significantly more on a per-mile basis than transcontinental travelers do. However, reinstituting regulation of fares to deal with this would be a major and unjust resumption of regulation with far-reaching consequences for the traveling public and the industry. For this reason DOT would be strongly opposed to this amendment. The larger point we wish to make is that there continues to exist, in some quarters at least, a substantial and growing sentiment for various forms of airline industry reregulation as evidenced by the interest in domestic fare reregulation.

Retention of the fitness certificate and a possible fare reregulation provision are not our only concerns. H.R. 5297 would also perpetuate the present regulatory environment by shifting CAB's antitrust responsibilities to DOT rather than to the Department of Justice (DOJ) as provided under current law. We oppose this change, because the airline industry is mature and should be subject to the same governmental processes as other industries. It isn't legitimate policy in our opinion to shift antitrust oversight from Justice to DOT just because the airline industry is the airline industry. Yet this is what we have in the House bill.

It is true that the Federal Aviation Act requires an assessment of transportation benefits as an element of airline antitrust analysis, but this requirement is not a valid reason to assign antitrust regulatory authority to DOT. At the present time, DOT files comments with the CAB in proceedings where significant antitrust issues must be weighed against transportation benefits and where DOT's expertise can be brought to bear. We will continue to file comments with Justice in such proceedings. Also, we have developed a general agreement with Justice to assure proper division and coordination of Justice's oversight of International Air Transport Association traffice conference agreements on the one hand, and DOT's review and approval of individual tariffs and rates on the other. This arangement will facilitate carrying out the international resonsibilities that will transfer to Justice and DOT from the CAB.

Another objectionable feature of the House bill is the provision amending the Secretary's data collection authority under section 329 of Title 49, United States Code. This provision would mandate for the first time that O&D and service segment data be collected. Secretary Dole testified before the House that the Department not only has adequate existing statutory authority to collect whatever airline data we believe is necessary but that DOT would continue to collect that data being collected by the CAB at sunset.

Thus the provision in the House bill relating to data collection not only ignores our commitment to ensure responsible reporting, but will also limit the Department's ability to adjust future data reporting requirements to keep abreast of changing market and regulatory developments. The data collection provision in H.R. 5297, simply put, is unneeded and unsound, without any apparent basis in fact or policy.

I realize that you and the Committee are most interested in our reasons for objecting to the House bill's disposition of the CAB's consumer protection role. Many seem convinced that the airline industry and its customers will not be able to to continue to conduct business as effectively as in the past without continuation of the special supervisory role that the CAB has exercised in the era before deregulation. The House bill would perpetuate the status quo by transferring the CAB's entire "unfair or deceptive trade practices" role under section 411 to DOT and by continuing the section 404(a) "safe and adequate" standard at DOT.

As a general matter, oversight of unfair trade practices is, with few exceptions exercised by the Federal Trade Commission. The maturity and competitiveness of the airline industry removes any rationale for treating it in a different manner. Consolidating regulatory authority, including consumer protection, into a single agency not only lacks a sound rationale, it creates, as I have said, a readily available foundation for reregulation.

We recognize that many carriers are extremely concerned that the CAB's current CRS rulemaking not be neglected or abandoned after sunset. The Department of Transportation continues to believe that the FTC is not only expert on such trade practice matters, but that it would provide excellent leadership on this issue after CAB sunset. Chairman Miller, speaking for the Commission, has already appeared before you today, and has spelled out the FTC's views in this area.

Secretary Dole has stated that clarifing legislation to make explicit the transfer of consumer protection authority from the CAB to the FTC would be justified. This can be accomplished by simply removing the present bar to FTC jurisdiction that appears in section 5(a) of the FTC Act. Also, we have not opposed the idea of transferring the CAB's consumer regulations directly to the FTC by statute, and authorizing simplified APA procedures for handling aviation consumer protection rulemaking rather than the more complicated Magnuson-Moss procedures normally applicable to FTC rulemaking. By waiving the Magnuson-Moss procedures, Congress would not merely be placing the aviation industry and its consumers on a par with comparable industries, but would in fact be giving it a more expeditious rulemaking procedure.

Finally, there has been concern that a "split" in consumer protection authority would result from our initial proposal, because DOT would succeed to CAB's section 411 authority in foreign air transportation when we inherit CAB's international oversight rule while the FTC would exercise that authority in connection with domestic aviation. In fact, DOT expects to exercise its 441 authority in the context of reviewing tariffs filed for foreign air transportation. Regarding consumer protection regulations in the international area, we have come to the conclusion that the Department should defer to the FTC under a Memorandum of Understanding or other administrative arrangement so that there is conformity betweeen DOT's and FTC's approaches to consumer protection. If however the Congress decides that it is necessary to consolidate all consumer protection authority in one agency, Secretary Dole testified before the House—and we reiterate now—that she believes FTC is the appropriate place rather than the DOT.

Another consumer issue which has also raised concerns in section 404 authority to regulate smoking on commercial air carriers. It is our opinion that section 404 "safe and adequate" authority will expire upon sunset of the CAB. We do not believe, however, that the absence of federal smoking regulations will be a problem. The majority of airline passengers regularly state a preference to be seated in a nonsmoking area of the plane, and I am confident that the airlines will continue to honor this preference by maintaining separate areas for smokers and nonsmokers.

Section 404 is also the basis for the CAB's rules protecting the rights of the handicapped in air travel. This is an extremely important matter which the Congress has made clear should not be entrusted to the marketplace. The lapse of section 404 will not leave DOT without the ability to continue regulatory protection for the handicapped, because we have adequate authority, through section 504 of the Rehabilitation Act of 1973 and grants made under our Airport Improvement Program, to assure that airlines afford the handicapped nondiscriminatory and safe access to air travel. We are currently exploring the need for rulemaking to establish specific and clear-cut requirements in this area.

In summary, the Department believes that the ADA establishes a sound foundation for CAB sunset and the transfer of its residual functions to DOT and other agencies. For this reason we oppose any legislation beyond that which would clarify the juristictional arrangements established by the ADA.

Let me close by offering any assistance we can to the Committee, including drafting assistance, to implement the Airline Deregulation Act. We appreciate this opportunity to be heard on this critical matter, and I would be pleased to respond to any questions that you and the Committee may have.

Senator KASSEBAUM. The next witness is Monte Lazarus, senior vice president, external affairs, United Airlines.

STATEMENT OF MONTE LAZARUS, SENIOR VICE PRESIDENT, EXTERNAL AFFAIRS, UNITED AIRLINES

Mr. LAZARUS. Madam Chairman, Mr. Chairman, once again, United Airlines appreciates the opportunity to testify on a phase of deregulation. This time we are discussing sunset-related amendments to the Federal Aviation Act.

United is grateful to you and the members of your subcommittee, and indeed the entire Congress, for passing the Airline Deregulation Act of 1978, and we are even more grateful that you have consistently supported deregulation through a fuel price crisis, a PATCO strike, and a serious recession, each of which distorted the marketplace and each of which threatened deregulation itself.

Madam Chairman, I am mindful of your injunction about confining my testimony to the consumer issues, so I will skip all my deathless prose on pricing and antitrust issues and confine myself to that single issue.

We urge that the future thrust of deregulation should be to rely on the marketplace and to treat our business as Government treats any other nonutility business. This latter point is especially important in view of the consumer issue before you.

There is indeed a strong argument against any sunset-related legislation. It can well be argued that the general framework of deregulation is well in place, that legislation this year threatens to be encumbered with morsels for this or that special interest, and that cleanup legislation can easily wait until after CAB disappears into the sunset.

We are sensitive to that argument, recognizing that reasonable people can and do differ on the need for a bill this year, and, as Senator Packwood said, we would prefer no bill to a bill laden with gifts for everyone.

Against that general framework, we offer some general principles:

First, we believe Congress should vigorously pursue deregulation, and if there is legislation that legislation should be aimed at cleaning up loose ends and taking care of significant matters that have been left open.

Second, CAB should be allowed to sunset on December 31, 1984, and there should be no attempt to revive any form of price, tariff or route regulation.

Third and probably most important here, our business is not substantially different from any others, and we should be subject to the same scrutiny as any other industry, and that goes for antitrust and consumer protection.

Fourth, Congress should avoid creating new bureaucracies which will tend to perpetuate the unnecessary, costly, inefficient, restrictive practices of CAB.

And with that, I would like to turn briefly and specifically to the consumer issue. We believe consumer protection and anticompetitive issues properly belong before the Federal Trade Commission. Why? Because that independent agency has long experience in both areas. Because it has the broad view of how consumer regulation should work across the economic spectrum.

Because we are highly concerned that if a new consumer function is created at the Department of Transportation we may well wind up with nine characters in search of an author—a bureau looking for something to regulate. It is beyond question by now that a regulator abhors a regulatory vacuum. He or she will seek to step in the marketplace at the drop of a regulation.

We say: Reasonable regulation, yes; unreasonable make-work, please, no. Once again, our business is no different than any other business and why single us out for special treatment? We do not want any protection, we do not want any special favors. We want to be treated like anyone else.

The administration wants the FTC to assume jurisdiction. Both concerned bodies—you have heard them this morning—take that position. Significantly, the air carriers also took that consensus position until the question of computer reservations systems split the industry. CRS is the single issue causing the shift to DOT jurisdiction, and we submit that it would be misguided to legislate on the basis of one narrow issue. But that is what is happening.

In the event that you are concerned about the how-to aspect of getting jurisdiction over to FTC with a body of rules and regulations, it is not that difficult. Congress can remove our exemption from section 5 of the Federal Trade Commission Act, and it can by a savings provision transfer over the body of CAB rules and regulations, and that latter point alone should dispel any concern you may have about the computer reservations issue.

And we have no objections to that. We are saying please, please, look at the long range and the broad issues. To expedite matters, of course, you can grant 553 informal rulemaking authority to FTC, and Chairman Miller has addressed that this morning.

If you are also concerned about splitting jurisdiction over consumer and anticompetitive practices internationally and domestically, then by all means put it all in the Federal Trade Commission. Let the Department of Transportation deal with those matters within its broad range of competence, such as international policy, international route selection, and essential air service.

In short, we urge you to legislate for proper reasons and not for narrow, short-term considerations.

We have given you our concerns, our judgments and our recommendations, and to be sure, these are debatable issues. In the short run it really is not going to matter where you put it. It is the long run we are concerned about. We respectfully request that you give your usual full consideration to our general principles and specific recommendations and, above all, we urge continued adherence to the sound principles of deregulation.

Thank you.

Senator KASSEBAUM. Thank you very much, Mr. Lazarus.

You mentioned that the FTC has had long experience and expertise in consumer affairs. Most of the private sector has really not particularly relished the expertise that the FTC has visited upon them over the years, and I guess I would ask you why you would think the FTC would be less regulatory, perhaps, than DOT, or be necessarily less looking for something to regulate, because certainly if you would speak to funeral directors or used car dealers or opticians and so forth, they would not share, I think, your view.

Why do you think the FTC would be less likely to regulate than if indeed this function and the rulemaking authorities and so forth that might be necessary would be left at DOT?

Mr. LAZARUS. I hope I did not say that they would be less likely to enforce consumer regulation, because that is not what I intended to say. What I mean is that if you put the body, the full body of regulation into the hands of the Department of Transportation, over the long run there is in our judgment going to be an effort to pull these things together and institute a regulatory apparatus that has broad scope.

Everyone, I think, here has agreed that there should be some preservation of consumer protection functions. We think that that function should be in the hands of the FTC. We are not concerned about overregulation in the consumer area, in that narrow area—

smoking, baggage, the things we have been talking about this morning. Those things have to be protected in the public interest and we do not have a concern.

Senator KASSEBAUM. What are you concerned about?

Mr. LAZARUS. We are concerned about moving a full apparatus, taking different blocks and chunks over to the Department of Transportation, where you are going to have an existing CAB apparatus just lifted from one regulatory agency and put in place at the Department of Transportation. And there will be temptation over the years to water down deregulation and to reregulate. That is what we are concerned about.

Senator KASSEBAUM. But essentially, from the testimony that we have had this morning, we are talking, what, about 15 people, is that what has been said, that will go? These same people will go either to DOT or FTC.

Now, Mr. Scocozza said that he believed one difference would be that at FTC they could draw on a broader scope of individuals who are involved in all sorts of different areas of concern, however, consumer-related. I assume you share that view, that those who are involved in the oil merger issues as well as the funeral home issues can provide a body and scope that is broader.

Mr. LAZARUS. That is correct. And what we are concerned about is when you take a function, another function that had been exercised by CAB, join it with other functions at the Department of Transportation, that there will be an effort over the years, as administrations change and as people come and go, to reregulate.

We think that is inevitable when you put that body together. That is why we would like to see that piece split out. There is a legitimate concern about consumer interest and we share that. We say, why single us out? Why put us together with other functions in the Department of Transportation?

Why not put us over in FTC, where every other nonutility business is treated?

Senator KASSEBAUM. Do the other airlines share your same concern?

Mr. LAZARUS. Some of them do, some of them do not. A year ago they all did. A year ago we were in consensus agreement, until the single issue of computer reservations systems split the consensus.

And we say, please do not let that single issue warp the thinking on the subject of consumer protection.

Senator KASSEBAUM. Well, that is a consumer protection issue.

Mr. LAZARUS. Absolutely.

Senator KASSEBAUM. I am sure you would agree.

Mr. LAZARUS. Absolutely.

Senator KASSEBAUM. Is it your belief that the FTC can handle this more expeditiously?

Mr. LAZARUS. It can handle it as expeditiously. All you have to do is take whatever the Board comes up with in a rulemaking—and they will come up with something—and take that body of regulations and transfer it over to the FTC.

And we are not arguing against that. We are not saying insulate us against CRS. What we are saying is, please do not let the tail of CRS wag the dog of consumer protection. And I do not mean that consumer protection is a dog. Please, do not misunderstand.

Senator KASSEBAUM. No, no; I understand. And I would certainly agree with you it should not. But I think it does point out the fact that most would agree—and you are a businessman—that FTC has by the very nature of its function and legislative intent been slow-moving. I think that certainly you would have to agree the responses are not rapid necessarily, and perhaps that is wise. I am not saying that it is not.

But there are times in the aviation industry, with the broad range of consumer interests that are there, that one needs a rapid response, not one that takes a year or two.

Mr. LAZARUS. If you trace back the history of the Civil Aeronautics Board—and you will forgive a personal reference; I spent 17 years there—I think you will find that——

Senator KASSEBAUM. Well, they have not been particularly——

Mr. LAZARUS [continuing]. The response time of the CAB, mostly during the time that I was there, for one reason or another was not particularly rapid.

If you are concerned about FTC rapidity or efficiency, I believe that you can accommodate that by taking care of the Magnuson-Moss restrictions and using informal rulemaking procedures. And as you said yourself, Madam Chairman, if the people are the same, then put the same procedures in place and you will not have any real difference in efficiency in our judgment.

If the people are the same, let the rulemaking go and allow the FTC to proceed in a more expeditious way, and you have accommodated the potential problem.

Senator KASSEBAUM. Well, I certainly do not mean to imply criticism for the FTC. I just think that my main concern is how we can most efficiently and effectively deal with the transfer of authority, that authority that does need to be transferred.

And I think it is only worrying to all of us here as we look at the bureaucracy, when we see it so divided and so scattered out among the different departments and agencies. And it certainly is bewildering to foreigners who come here and try and deal with aviation issues and have to go to various departments and agencies.

I think we would all agree that both the international and domestic should be combined, and that seems to be agreed upon. But I would also say that I am sure that it may be in the interests of some who would feel that a division among the departments and agencies works to an advantage as well. After all, it diffuses some of our efforts here in both the House and Senate, particularly in the House, to focus on where exactly all of the issues can reside, and it even divides the committee if indeed part of it will be FTC and DOT.

And I think that that can have certain advantages, but certainly disadvantages. And I think my concern is just where I would believe and the committee would believe that it can be most effectively administered.

Mr. LAZARUS. There is no question that this is a debatable issue. It is certainly not a clear-cut question. Our overriding concern is on the side of reregulation. That is the thing that haunts us. We are terribly concerned about the prospect of somewhere down the road having an agency or a department with the authority to move in diverse areas, using that authority to reregulate an industry.

We share the concern about consumer protection, but because of our overriding fear of reregulation we would prefer to have the matter reside at FTC.

Senator **Kassebaum**. Thank you, Mr. Lazarus.

The **Chairman**. Mr. Lazarus, to United's credit, it has been very supportive of deregulation. It was the only major airline that supported the Deregulation Act when it was passed in 1978. I do not think any of the big carriers would want to go back to reregulation now, but United has an especially good track record.

A year ago, all the major airlines were satisfied to have consumer protection jurisdiction go to the FTC.

Mr. **Lazarus**. Yes, sir.

The **Chairman**. Now they are split, and I think you are probably right, they are split over the issue of the computer reservations system. Don't you think that the real reason for the split is that you and American, correctly probably, believe that the present FTC, with the present Chairman, is less likely to upset the computer reservations system than the Department of Transportation might?

You are not saying they would, but you would rather take your chances with Jim Miller and the present FTC than the Department of Transportation?

Mr. **Lazarus**. That is a point. I happen not to agree with it.

We simply do not agree with the point, because there is certainly a perception out there that our overriding desire is to have something going over to the FTC where we can overrule whatever the Board does on CRS. That is not the fact.

We think that whatever happens, whatever the Board does, and wherever you put jurisdiction, the CRS rules are going to live and we will have to live under those rules. And the CRS issue is a dead issue for us at this point. At the CAB that issue is gone.

We know there is going to be a rulemaking. We know we are going to have rules. We are going to live under those rules. The question to us is not the short-term issue of CRS; it is the longer term issue of reregulation, and that is the plain, simple truth.

And that is why we say, do not let the single issue influence the broader question.

The **Chairman**. Well, I agree. And you are convinced that, no matter how narrowly we tailor this bill, how carefully we craft it, or how antiregulatory it is, that somehow at the Department of Transportation regulation is going to creep in?

Mr. **Lazarus**. That is correct. We have seen it before and we are afraid we will see it again in the future. And we are more concerned about that than any single narrow issue.

The **Chairman**. Well, I think that is a justified fear. And as far as I am concerned, I want to help pass a bill. I think we need one. But if there is even a smidgen of reregulation in it, or some hook by which somebody could try to reregulate, I will not support it.

I like the way deregulation has worked. By and large, this country is infinitely better served than it was before deregulation, including smaller towns, and I do not want to see that undone.

Mr. **Lazarus**. That is our concern.

The **Chairman**. Thank you.

Senator **Kassebaum**. Thank you.

Mr. Lazarus, I only would observe, and it has been observed many times on and off this morning, that people certainly at DOT right now are ones who have been those involved in the implementation of deregulation. I think it is a commitment that exists there, that is far more fervent than, let me say, it would seem to me might exist at the FTC.

And I think you can only go back to the history of the very nature of the responsibility of the FTC in the competitiveness, to protect the consumers, that leads to decisions and rulemakings which have been the bane of existence for the businessmen that I hear from year-in and year-out, who feel that indeed they have had to live with a regulation they feel is not fair.

Mr. LAZARUS. With all respect, recognizing that argument, in our judgment, there is one flaw and that is your early reference to the present makeup of the DOT. We agree with you. We do not have any problem with the present DOT. But over the long run we are concerned, because administrations do change, the cast of characters in departments changes.

Senator KASSEBAUM. At both FTC as well as DOT.

Mr. LAZARUS. That is right, but the FTC is administering one area, which is consumer protection, and they then would not have the ability to take the broad scope of economic regulation and impose it on an industry.

On the other hand, if you put consumer regulation along with everything else over in the DOT, then in the longer run you have the ability down the line to have a different administration, a different cast of characters walk in and step by step reregulate this business. And that absolutely frightens us.

Senator KASSEBAUM. Well, I certainly salute your courage and your conviction, and if indeed you feel that the CRS is not an issue and that it would be viewed at some point by the FTC as being anticompetitive and you would welcome that sort of investigative efforts and rulemaking authority of the FTC, I think that, as I say, you are to be saluted.

Mr. LAZARUS. Let them look at us. We have nothing to hide.

[The statement follows:]

STATEMENT OF MONTE LAZARUS, SENIOR VICE PRESIDENT, EXTERNAL AFFAIRS, UNITED AIRLINES, INC.

Madam Chairman and members of the committee: Once again United Airlines appreciates the opportunity to testify on a phase of airline deregulation. This time, we are discussing sunset-related amendments to the Federal Aviation Act. United is grateful to you, the members of your Subcommittee, and the entire Congress, for passing the Airline Deregulation Act of 1978. We are even more grateful that you have consistently supported deregulation through a fuel price crisis, a PATCO strike and a serious recession—each of which distorted the marketplace, and each of which threatened deregulation itself.

United believes that there are certain general guiding principles to consider as the Civil Aeronautics Board disappears into the sunset.

Without lumbering you with reams of data, analysis and opinion, we think the record is clear enough that deregulation is working—and working well. The industry has come through the trying transition from stifling regulation to a relatively free market. Carriers are emerging more lean, more productive and more attuned to public demand. We well recognize that there are still some controversial matters arising partly as a result of deregulation. And it is truly unfortunate that some companies in our business, as in other businesses, cannot survive the crucible of the marketplace. However, that's the nature of a competitive economic system. There are successes and there are failures. Overall, there is ample evidence to demonstrate that, under deregulation, the public is receiving better service at reasonable fare levels, and that the industry is more efficient and more productive. We urge that the future thrust of deregulation should be to rely on the marketplace, and to treat our business as government treats any other non-utility business. This latter point is especially important in view of some legislative proposals before your Subcommittee.

There is a strong argument against any sunset-related legislation. It can well be argued that the general framework of deregulation is well in place, that legislation this year threatens to be encumbered with morsels for this or that special interest, and that any "clean up" legislation can easily wait until after CAB is laid to rest. We are sensitive to that argument, recognizing that reasonable people can, and do, differ on the need for a bill this year. And, we would prefer no bill to one laden with gifts for everyone.

Against that framework, we offer the following general principles:

(1) Congress should vigorously pursue deregulation, and any legislation should be aimed at cleaning up loose ends, and taking care of significant matters previously left open;

(2) CAB should be allowed to sunset on December 31, 1984, and there should not be any attempt to revive any form of price, tariff or route regulation;

(3) Our business is not substantially different from others, and we should be subject to the same scrutiny as any other industry;

(4) Congress should avoid creating new bureaucracies which will tend to perpetuate the unnecessary, costly, inefficient, restrictive practices of the CAB.

In this context, let's examine our four principal concerns in any new bill:

First, we share the view of other carriers on the need for a strong Federal preemption section to obviate the problem of piecemeal regulation by 50 states and localities. ATA is presenting you with a detailed proposal and we associate ourselves with it.

Second, we believe consumer protection and anticompetitive issues properly belong before the Federal Trade Commission. Why? Because that independent agency has long experience in both areas. Because it has the broad view of how consumer regulation should work across the economic spectrum. Because we are concerned that if a new consumer function is created at The Department of Transportation, we may well wind up with Nine Characters in Search of an Author—a bureau looking for something to regulate. It's beyond question by now that a regulator abhors a regulatory vacuum. He or she will seek to step into the marketplace at the drop of a regulation. Reasonable regulation, yes; unreasonable make work, please, no. Once again, our business is no different than any other business. Why single us out for special treatment?

The Administration wants the FTC to assume jurisdiction. Both concerned bodies—FTC and the Department of Transportation—take that position. Significantly, the air carriers also took that consensus position until the question of computer reservations systems split the industry. CRS is the single issue causing the shift to DOT jurisdiction. We submit that it would be misguided to legislate on the basis of one narrow issue—but that's what is happening.

In the event you are concerned about the "how to" aspect of getting jurisdiction over to FTC with a body of rules and regulations, it's not that difficult. Congress can remove our exemption from Section 5 of the Federal Trade Commission Act, and can, by a savings provision, transfer over the body of CAB rules and regulations. That latter point should itself dispel any concern you may have about computer reservations.

If you are also concerned about splitting jurisdiction over consumer and anticompetitive practices internationally and domestically, then put it all in the Federal Trade Commission. Let the Department of Transportation deal with those matters within its broad range of competence such as international policy, international route selection and essential air service.

In short, we urge you to legislate for proper reasons, not for narrow, short-term considerations.

Third, continue to transfer agreement and antitrust immunity jurisdiction to The Department of Justice. It's more than common sense to put these matters in the hands of the antitrust experts. It's consistent with the way government deals with other non-utility industries. We must say it again: We are no different than any other business. It is unnecessary and inconsistent to set up different rules for air transportation than other business. Let us play by the same rules. There are those who may argue that The Department of Justice will bring down the interline system in whole or in part. We disagree. There is no evidence that Justice has acted in this manner over its long history. Indeed, we are likely to find more logic and consistency in The Department of Justice than in another department more attuned to policy and political considerations.

Finally, legislative proposals have been advanced to reimpose government authority to review and seek judicial relief for fares alleged to be discriminatory. Authority for the Civil Aeronautics Board to prevent unjust and discriminatory fares was terminated on January 1, 1983. Under one proposal, a petition could be filed with the Secretary of the Department of Transportation by a community to determine if a fare is discriminatory and if a violation occurred, the Secretary would apply to the U.S. Attorney for prosecution. If a violation has not occurred and the Secretary fails to take action within a given period upon receipt of petition, the peititioner may bring a private right-of-action with the U.S. District Court.

Despite assertions to the contrary, this proposal consititutes re-regulation of airline fares. Air carriers would not be free to establish prices without fear of action being brought with the Secretary of DOT or U.S. District Court. Airlines would be forced to defend their pricing policies between city pair markets and justify their pricing and marketing decisions.

This proposal presents a number of practical problems which would ultimately harm airlines, consumers and small conmunities. Here are several examples:

"1. The proposal fails to define "discrimination" and does not establish any standards or method for determining what type of fare constitutes discrimination. Presumably, DOT, the U.S. Attorney or U.S District Court would be required to establish the standards and method for making such a decision. This would require creation of a complex governmental bureaucracy to review, analyze and make determinations on fare levels. Carriers would also be required to file tariffs and other price information in order to give the government a basis upon which to determine the reasonability of a fare.

"2. Air carriers would be reluctant to enter or retain service in markets where competitive service does not exist for fear that any fare established might be subject to charges of discrimination. Ultimately, service to medium and small communities would deteriorate and frustrate governmental goals and programs to insure essential air service. We assure you that this is a real danger.

"3. The proposal fails to recognize the cost differentials associated with short haul versus long haul markets. Pricing levels are also established to reflect particular characteristics of the market such as density. In addition, the maintenance and cost of operations and service from small cities greatly exceeds operations from larger markets.

"4. It would be impossible to establish standards to detemine "reasonableness" since airlines have different cost structures upon which fares are based. Further, the proposal does not take into account changes to operating costs, i.e., fuel prices and labor costs, and general economic conditions which affect elasticity of demand."

Madam Chairman, we have given you our concerns, judgments and recommendations. To be sure these are debatable issues. We respectfully request that you give your usual full consideration to our general principles and specific recommendations. Above all, we urge continued adherence to the sound principles of deregulation.

Senator KASSEBAUM. Thank you very much.

The next witnesses make up a panel: Cornish Hitchcock, aviation consumer action project; Richard Mathias, senior vice president, government affairs, Pan American Airlines; Richard Rosenfeld, president, National Indirect Air Carrier Association.

It is a pleasure to welcome you this morning. Mr. Hitchcock, you must feel you are constantly up here testifying, the watchdog of the consumers, I would say. Let us begin with you.

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

Mr. HITCHCOCK. Thank you very much, Senator. This may be the last appearance on this issue discussing Civil Aeronautics Board sunset.

We appreciate the invitation to be here this morning, and I will condense the remarks and focus mostly on the procedural aspects and the organizational questions. Let me say, we appreciate the speed with which the committee has taken up this bill, and we hope that it will be possible to have swift passage of a clean bill that deals with the consumer protection problems.

Our testimony has discussed two key points, which is why a bill is needed and why it is important for Congress to preserve not just the rulemaking authority, but also the existing rules in effect on the date of sunset, so let me discuss the organization issue now.

In listening to the debate this morning, I think it is important not to focus on such larger questions as reregulation versus deregulation. Congress has decided what form of regulation will end, what residual functions will remain. The key question, I think, is the one which you put, which is: How does Congress make sure that the Government operates most efficiently with those things that Congress wants to be regulated?

The Mineta bill will work. It is an effective mechanism that will give authority to DOT. It will do so in an efficient manner. We have some concerns about DOT's proposal to sprinkle existing functions throughout the Office of the Secretary, rather than taking what authority goes to DOT and putting it in a modal administration, but I will come back to that in a minute.

The administration is urging that FTC be the successor agency. Let me focus on that alternative and then discuss the others. We recognize that in many respects FTC is a logical choice, since most or many of the Board's rules or enforcement activities under section 411 are nearly identical to the types of rules and regulatory authority handled under Section 5 of the FTC Act. And I am thinking of areas like overbooking, baggage liability limitations, deceptive advertising, package tours, and the emerging computer reservations system issue.

It would be easy for Congress to take care of this problem by repealing the prohibition in section 5 of the FTC Act, transferring authority down to the FTC and taking care of the Moss-Magnuson problems and allowing for more efficient rulemakings so that they do not go on for 8 years on issues that turn out to be perennials.

The problem is that there is not a clean fit between what the CAB does and what the FTC does on the 404 authority and the 411 authority, and smoking and the handicapped are two issues that sort of stick out as being not what the FTC has done traditionally.

Now, we recognize that letting the FTC write and enforce smoking rules and other rules dealing with safe and adequate service is something of a departure if all the rules are going to go to the FTC. Frankly, it does not bother us, but if it does cause concern to some in the Congress, that leaves you with two alternatives.

One is not so good, and that is splitting up the authority between the FTC and DOT. We think it would be a major mistake if consumers had to write to one agency if they were bumped from a flight and another agency if they were denied their no-smoking seat. That just does not make sense and, no matter which agency you choose, everything should be under one roof.

That brings me to the better alternative, which is to give authority to DOT, which is exactly what H.R. 5297 does. The approach does have some virtues, one of which is simplicity. It transfers everything down to DOT that is going to be covered and allows for

DOT to regulate. It will allow for an orderly transition and DOT does have, certainly, its aviation expertise.

There are some limitations, principally the fact that DOT proposes splintering these functions throughout the Office of the Secretary, which has very little regulatory authority.

In short, there is no perfect answer. Each side, the FTC option or the DOT option, has a number of pluses, but they also have a down side. The issue of organization of *DOT* vs. *FTC* seems in our view to be a little more controversial and to have generated more controversy than is particularly warranted.

With only the limited amount of time remaining, we would urge you to make the choice between agencies, to keep the authority within one agency, and to enact the bill as promptly as possible. And with that I will conclude.

Thank you.

[The statement follows:]

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION, CONSUMER ACTION PROJECT

Madam Chairman, Members of the Subcommittee: On behalf of the Aviation Consumer Action Project (ACAP), I appreciate the invitation to testify on H.R. 5297, the Civil Aeronautics Board Sunset Act of 1984.

ACAPL is the only non-profit consumer organization working full-time on aviation matters. Since its founding in 1971, ACAP has participated in numerous proceedings before the CAB, the FAA and other government bodies. We have testified before Congress, published studies and reports and offered advice to tens of thousands of passengers. ACAP is supported entirely by public contributions.

ACAP commends the Committee for its prompt consideration of this bill, which recently passed the House. This legislation is important in order to assure an orderly transition when the CAB closes down at the end of the year and its residual functions are given to other agencies. In light of the limited time remaining before the end of the session, we urge prompt action by the Senate, and we especially urge that no non-germane or controversial amendments be added, such that progress would be slowed.

ACAP supported the Airline Deregulation Act of 1978 when it was being considered by the Congress, and we remain supporters today. We believe that the sunset provisions of the Act correctly parcel out the specified residual functions among other departments, and I would like to focus our testimony on one issue that was not adequately addressed in the 1978 Act, namely, the CAB's consumer protection rules and responsibilities and how they should be handled after sunset.

Let me summarize our key points briefly.

First, we believe that this bill is needed, because without it, existing consumer protection rules will lapes in six months.

Second, it is important for Congress to preserve not just the CAB rulemaking powers in this area, but also those consumer protection rules in effect on the date of sunset.

Third, a good case can be made for giving the CAB's rules and authority in this area to either the Department of Transportation or the Federal Trade Commission. Each approach has its pluses and its minuses. Regardless of how you come out on this issue, however, it is important that the CAB's consumer protection rules and functions be placed under one roof and not be divided between two agencies. The result of such a split would only be needless confusion and inefficient handling of consumer complaints.

Let me now address these points in more detail.

Over the years, the CAB has adopted rules in several important areas affecting passengers, *e.g.*, overbooking, baggage liability, package tours and in-flight smoking. In addition the Board recently proposed standards to regulate the anti-competitive features of computer reservation systems, and a final rule should be issued later this year. Finally, the CAB moves on a case-by-case basis against deceptive advertising and other unfair or anti-competitive practices. such as overcharges or undue delays in making refunds.

Without legislation, the current rules expire on 31 December 1984, and the traveling public would be left in the lurch. We have in the past disagreed with specific facets of specific rules, but overall, they go a long way towards dealing effectively with recurrent consumer problems, and they are certainly preferable to the alternative of no rules at all.

DOT argues that even if no bill is passed, the FTC can police "unfair or deceptive practices or unfair methods of competition" in the airline industry under section 5 of the FTC Act. The FTC, however, argues that section 5 forbids it from regulating airlines. This impasse leaves travelers caught in the middle and underscores the need for a bill.

Let us assume for the sake of the argument that DOT is legally correct, that no bill is needed and that current law allows the FTC to police the airline industry. The problem with this scenario is that it would take the FTC many years to develop a coherent body of law specifying exactly what rights the public has and does not have. This delay would result because under current law, the FTC can regulate in only one of two very time-consuming ways. It can either adopt trade rules (similar to current CAB rules), but that requires formal hearings under the Magnuson-Moss procedures, or else it can litigate consumer complaints against airlines on a case-by-case basis and let a body of law develop based on the outcomes of these cases.

Both approaches are unsatisfactory for a number of reasons. In the first place, it is wasteful for the public, the industry and the government to spend years re-inventing the wheel on subjects where workable rules are already in place. Second, the FTC may decide not to take action on specific consumer problems, and even if it does act, there is no certainty that whatever rules ultimately evolve over the next decade will be as good as the CAB rules already on the books. Thus, from a traveler's standpoint, this "no legislation" option is no option at all.

For these reasons, ACAP recommends the passage of legislation which transfers not only the CAB's rulemaking authority in this area, but which also transfers those consumer protection rules that are in effect at the end of the year. H.R. 5297 does just that, and there are several reasons why this is the most effective way to proceed.

It provides continuity and consistency for the public and the industry alike.

It avoids the waste of resources that would ensue if only the rulemaking authority were transferred and the successor agency had to draft new rules from scratch.

The specific rules I mentioned have all been reviewed by the CAB since 1981 and have been found necessary to protect the public, even with the greater competition since deregulation began. And while these rules cover important subject areas, they are minimally intrusive, as most of them tend to place a premium on disclosure, which has always been regarded as an essential form of consumer protection in non-regulated industries.

Transferring the existing rules as well as the rulemaking and enforcement powers would not lock current rules into legislative concrete, as they could be modified by the successor agency, should the need arise.

This brings me to what has emerged as the most controversial issue before the Committee, namely, whether FTC or DOT should be the successor agency. A good case can be made for assigning the CAB's consumer protection role to either agency. We recognize that in many respects the FTC is a logical choice, since many of the Board's rules and enforcement activities are taken pursuant to section 411 of the Federal Aviation Act, which is nearly identical to section 5 of the FTC Act. Overbooking, baggage liability limits, deceptive advertising, package tours and computer reservation system bias are topics that come to mind specifically. It would be easy for Congress to repeal section 5's or prohibition on regulating airlines, transfer existing CAB rules and authority to the FTC, and let the FTC issue rules and enforce them in the future.

The problem is that there is not a clean fit between the CAB's consumer protection function and that of the FTC. Specifically, the CAB has issued rules regulating not only anticompetitive practices, but also "safe and adequate service," relying on section 404 of the Federal Aviation Act. The CAB's in-flight smoking rules are the best example of this latter type of regulation, which many passengers strongly support.

We recognize that giving the FTC authority to write and enforce smoking rules and any other "service" rules may strike some as a departure from traditional FTC regulation of anticompetitive practices. Frankly, it does not bother us, but if it is a concern to the Congress, there are two alternatives, one good, one not so good.

The not so good alternative is giving the section 411 rules and authority to the FTC while giving the section 404 authority to DOT. In our view, this sort of split would be a major mistake, and the only result would be public confusion. It would be hard to explain to passengers why they would have to write two separate letters to two different agencies if, for example, they were bumped from their original flight and then denied a no-smoking seat on the flight they do take. Congress should choose one agency as the CAB's successor and keep all consumer protection responsibilities under one roof.

This brings me to the approach taken in H.R. 5297, which gives DOT all consumer protection responsibilities. This approach has several virtues, the most important of which is simplicity. The Airline Deregulation Act assigns a number of responsibilities to DOT, starting next year, and there is a lot to be said for including consumer protection as part of the package, to assure an orderly transition and to avoid the problem of split jurisdictions I mentioned a moment ago. In addition, DOT has its own aviation expertise.

But just as the FTC option has drawbacks, this option has its own limitations. For example, the plan unveiled by DOT for handling its post-sunset responsibilities indicates that the locus of power will lie within the Office of the Secretary, rather than in a modal administration, which is the way that the rest of the Department is organized. There is nothing inherently wrong in such an arrangement, but the Office of the Secretary has little experience with writing or enforcing regulations and has traditionally focused on policy matters. Also troubling is the fact that the DOT plan proposes sprinkling its inherited functions throughout the Office of the Secretary, rather than consolidating them under a single administrator. We are concerned that this dispersal of functions would be less efficient than if the residual functions were kept together.

In short, there is no perfect answer to the question of which agency should inherit the CAB's consumer protection role, other than to say that the responsibility should not be divided. Because this issue seems to have become more controversial than is warranted, and because only a limited amount of time remains in this session, we would urge the Committee to make its choice and to enact H.R. 5297 as promptly as possible.

Thank you again for the opportunity to testify today. We are prepared to work with the Committee on this issue, and I will be happy to respond to your questions.

Senator **Kassebaum**. Thank you very much.

Mr. Mathias.

STATEMENT OF RICHARD D. MATHIAS, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS, PAN AMERICAN WORLD AIRWAYS, INC.

Mr. **Mathias**. Thank you, Madam Chairman.

I am Dick Mathias, senior vice president of government affairs for Pan American.

Thank you for the opportunity to appear here today. I am appearing on behalf of Pan Am and 19 other airlines: Air Atlanta, Air Cal, Air Florida, Alaska, Eastern Airlines, Empire, Frontier, Jet America, Midway, Muse Air, Northeastern, Ozark, PSA, Piedmont, Republic, Southwest, TWA, US Air, and Western.

Many of these carriers are also represented here today, and all of them have asked me to tell you that they join in support of my statement. We have submitted the written testimony which you have for the record. I will briefly summarize the key positions that we have with respect to consumer protection.

Before I start, let me say I am somewhat in a state of shock for two reasons this morning. First, I have just listened to my old friend and adversary Mr. Hitchcock speak for 10 minutes and I agree with everything he said. First time that has ever happened to me.

The second thing is, I just heard United Airlines say that CRS is a dead issue, and I am not quite sure whether Mr. Lazarus is going to resurrect that dead issue. But I assume it means at least that they are not going to take to court an appeal of the Board's rules, and that is encouraging to all of us.

We have asked to appear today because there are issues related to CAB sunset which we believe are of unusual importance and do require legislative action as soon as possible. Let me emphasize at the outset and for the record that we are not here to support any kind of reregulation or any increase in current regulation, or to raise any matters which are not directly related to CAB sunset.

Our position is that, whatever else the committee does this session, its first priority must be to move this legislation. Although other issues are important, they should not be allowed to encumber this legislation or interfere with the overall purpose of accomplishing a smooth and efficient CAB sunset.

The House has already taken action on CAB sunset and has adopted H.R. 5297, a bill which deals wisely and fairly with the issues that need to be resolved.

Our focus today is on sunset issues which are nominally questions of agency jurisdiction, but which are nevertheless extremely important to the gut issues of consumer protection and the future competition in the airline industry. The primary concern is the future of section 411. An additional primary concern, of course, is the future jurisdiction over section 412 and section 414, because those are fundamental to the system of intercarrier agreements that are crucial to the structure of international and domestic air transportation.

Let me discuss primarily section 411 in the brief time we have this morning. As you know, it prohibits unfair or deceptive practices, affecting consumers directly, and unfair methods of competition among carriers, which affects consumers indirectly but also very seriously. It is the foundation for much of the CAB's existing consumer protection regulation. Not all. It is not the foundation for all the consumer protective regulation, but it is for a great and important number of rules.

Under the Airline Deregulation Act, passengers in foreign air transportation will continue to be subject to such protection under section 411. However, unless Congress acts this session that protection will expire for domestic passengers.

The same will be true with respect to unfair methods of competition in domestic air transportation. Here a failure to act would be even more serious, because of our concern about the CRS issue. For example, one-half of the Nation's airlines tickets are sold through travel agencies using computer res systems owned by the two largest airlines, United and American.

The recent investigation of the Department of Justice and the CAB's current rulemaking proceeding have revealed unfair competitive practices in the operation of these systems. The CAB will soon issue rules, we hope, dealing with this problem. However, unless effective action is taken by Congress this session, there will be no way after December 31, 1984, to enforce those rules or to modify them.

There are other matters also, such as those pertaining to interline relationships between airlines, on which prompt, effective agency action may be necessary to preserve new entry, which is a basic goal of deregulation.

Assuming Congress is prepared to preserve section 411 for domestic service, the question remains as to what agency should have the jurisdiction, and this is an important issue, perhaps the most important. The airline industry is sharply, but by no means evenly, divided on the issue.

At least 20 air carriers favor jurisdiction in the Department of Transportation. Two or perhaps three carriers, principally United and American, the owners of the two major computer res systems, are advocating FTC jurisdiction.

The reasons we support DOT jurisdiction are basically twofold, and I think they have been outlined here this morning: To avoid a division of responsibility between domestic and international air service for consumer protection functions and for control of unfair competitive practices; and two, to assure prompt and effective action, especially with respect to anticompetitive practices growing out of the computer reservation systems and changes in interline relationships among the carriers as a result of deregulation.

First let me speak to the domestic-international split. There is no reason to believe that FTC, which is not an executive branch agency, would adopt the same rules for domestic passengers as DOT would for international. Many domestic flights carry both domestic and international passengers, and many passengers convert from one status to the other without knowing where the line is drawn.

Depending on their status, passengers would be covered by different rules on baggage liability, conditions of carriage, denied boarding, et cetera. Such different rules could also create a nightmare for the airlines in trying to maintain standard airline ticket stocks, interline baggage transfer agreements, accurate notices to passengers of their rights.

Because of the split of authority, the work of the two agencies will necessarily overlap and their staffs almost certainly would duplicate each other. Consumers do not understand the fine jurisdictional lines. They want and expect the Government to organize itself to respond efficiently and simply to consumer demands and not force the consumer to go in to some lawyer first and find out whether his status was international passenger or domestic passenger.

I would like, too, to respond for just a moment to the suggestion that was raised in the House and here again this morning, that one facile solution to that problem would be to take the consumer protection and unfair methods of competition jurisdiction with respect to international matters out of DOT and put that over in FTC with domestic rulemaking authority on those same subjects.

In our view, very clearly and firmly, that would attempt to solve one problem by creating an even bigger problem, and that is you would be splitting down the middle the international aviation jurisdiction that we now at least have under the old ADA and would also still have under the Mineta bill.

We are, as Mr. Scocozza admitted this morning, like it or not, going to continue to have considerable regulation in the international area as a result of residual authority passing from CAB to the DOT. They will continue to regulate closely international fares, international tariffs and the tariff conditions. In those tariff conditions are things like charter rules, notices to passengers—many of the consumer protection features that are important for the future.

You cannot simply and fairly to the industry or to passengers carve out what you call consumer protection and unfair methods of competition rules from the rest of international aviation regulation.

When the focus shifts to unfair competitive practices, the reasons for DOT jurisdiction are especially compelling. First, there is the same domestic-international dichotomy. There is a serious need for our Government to contain unfair computer res practices against U.S. carriers by foreign carriers. This is not just a domestic issue. They use some of the methods of bias and unfair displays that United and American have been seen to do domestically.

Under the present law, DOT will automatically acquire that responsibility with respect to international fares. In addition, assuming the transfer of sections 412 to 414 authority to DOT, DOT will inherit virtually the entire CAB staff which has worked on the CRS issue.

Finally, we are concerned that the FTC may not be in a position to act firmly and expeditiously on the variety of problems that may arise under section 411. You know, it has been suggested this morning that, well, you can deal with that by waiving the Magnuson-Moss procedures and establish some new procedures for FTC which they do not have now and do not use for anybody else, that would involve informal rulemaking.

I would point out to you that United Airlines was the strongest insistent at the CAB proceedings that it not use informal rulemaking proceedings, but that it give United a full day in court on the CRS issue. We would expect other carriers in other situations down the road. not only on CRS but other important issues that would involve the FTC jurisdiction, to insist that they not be treated by informal rulemaking procedures.

The FTC staff resources, its overall way of going about operations, its multifaceted political personality, its five-member attempt to reach consensus on critical issues, its limited exposure to transportation issues and lack of longstanding expertise in this area do not make it as well suited as DOT to tackle the kinds of issues that could arise and require prompt action after CAB sunset.

I think that I have spoken long enough, but I do want to just conclude by saying that we do not understand, the 20 carriers do not, the fear that has been expressed that what we are proposing is going to lead to reregulation. If we thought so, we would never be here pushing for a clean and simple CAB sunset bill.

We think the fear is totally ungrounded, although we do know where United and American are coming from. We do understand that the FTC would like to have more power and jurisdiction.

We do really fear that, with respect to the DOT's position, that the fear is ungrounded, that they can be given jurisdiction and be expected to handle it responsibly, efficiently, and without going to the extreme of any serious reregulation that is not contemplated by Congress or the carriers.

Thank you very much.

[The statement follows:]

Statement of Richard D. Mathias, Senior Vice President, Government Affairs, Pan American World Airways, Inc.

Chairman Kassebaum and Members of the Committee: Thank you for the opportunity to appear here today. I am Richard Mathias of Pan American World Airways. I am accompanied by John Ash, Vice President, Government Affairs of TWA, Bill Oakes, Vice President, Marketing of Republic, and Randy Malin, Executive Vice President-Marketing of US Air. In addition to the four carriers on this panel, 15 other airlines—Air Atlanta, AirCal, Air Florida, Alaska, Eastern, Empire, Frontier, Jet America, Midway, Muse Air, Ozark, PSA, Piedmont, Southwest, and Western—many of which are also represented here today, have asked me to tell you that they join in support of my statement.

We have asked to appear today because there are issues related to CAB sunset which we believe are of unusual importance and require legislative action as soon as possible. Let me emphasize at the outset that we are not here to support any kind of reregulation, or increase in current regulation, or to raise any matters which are not directly related to CAB sunset. Our position is that, whatever else the committee does this session, its first priority must be to adopt legislation without delay which deals with the key unresolved issues of CAB sunset. Other issues, however important, should not be allowed to encumber that legislation or interfere with that purpose. The House has already taken action on CAB sunset and has adopted, in H.R. 5297, a bill which deals wisely with the issues that need to be resolved. We commend that bill to you as a framework for your own action here.

Our focus today is on two sunset issues which are nominally questions of agency jurisdiction but which are nevertheless extremely important to the future competitiveness of the airline industry. The first concerns the future of Section 411 of the Federal Aviation Act; the second concerns Section 412 and the related powers under Section 414. In both cases we believe that these sections need to be carried on under the jurisdiction of the Department of Transportation.

First, let me discuss the Section 411 issue. As you know, Section 411 prohibits unfair or deceptive practices and unfair methods of competition in air transportation. As such, it is the foundation for much of the CAB's existing consumer protection regulation. Under the Airline Deregulation Act, passengers in foreign air transportation will continue to be subject to such protection under Section 411. However, unless Congress acts this session, that protecion will expire for domestic passengers.

The same would be true with respect to unfair methods of competition in domestic air transportation. Here a failure to act would be even more serious. For example, one-half of the nation's airline tickets are sold through travel agencies using computer reservations systems owned by the two largest airlines, United and American. The recent investigation of the Department of Justice, and the CAB's current rulemaking proceeding, have revealed unfair competitive practices in the operation of these systems. The CAB will soon issue rules dealing with this problem. However, unless effective action is taken by Congress this sesssion, there will be no way after December 31, 1984 to enforce the rules which the CAB is preparing, or to issue amended rules as may be required. There are other matters also, such as those pertaining to interline relationships between airlines, on which prompt, effective agency action may be necessary to preserve new entry, a basic goal of deregulation. It is unthinkable that Congress would leave these matters unattended.

Assuming Congress is prepared to preserve Section 411 for domestic service, the question remains as to what agency should have jurisdiction. This is an important issue, perhaps the most important facing you in this sunset legislation. The airline industry is sharply, but by no means evenly, divided on the issue. At last count, 20 air carriers favored jurisdiction in the Department of Transporation. Two, or perhaps three carriers, principally United and American, the owers of the two major computer reservations systems, are advocating FTC jurisdiction.

The reasons we support DOT jurisdiction are basically two-fold: (1) to avoid a division of responsibility between domestic and international air service for consumer protection functions and control of unfair competitive practices, and (2) to assure prompt and effective action especially with respect to anticompetitive practices growing out of computer reservations systems and changes in interline relationships.

First, let me speak to the domestic-international split as it would affect consumer protection. There is no reason to believe that FTC, which is not an executive branch agency, would adopt the same rules for domestic passengers as DOT for international. Many domestic flights carry both domestic and international passenagers and many passengers convert from one status to the other without knowing where the line is drawn. Depending on their status, passengers would be covered by different rules on baggage liability, conditions of carriage, denied boarding, etc. Such different rules could also create a nightmare for airlines in trying to maintain standard airline ticket stock, interline baggage transfer agreements and accurate notices to passengers of their rights.

Because of the split authority, the work of the two agencies will necessarily overlap and their staffs almost certainly will duplicate each other. Consumers who do not understand the fine jurisdictional line between the two agencies will inevitably contact the wrong one, creating a sense that they are getting a government run around instead of the help they want.

When the focus shifts to unfair competitive practices, the reasons for DOT jurisdiction are especially compelling. First, there is the same domestic/international dichotomy. There is a serious need for our government to contain unfair computer reservations practices against U.S. carriers by foreign carriers using some of the same methods that have been used domestically. Under present law DOT will automatically acquire that responsibility. In addition, assuming the transfer of section 412/414 authority to DOT, it will inherit virtually the entire CAB staff which has worked on the CRS issue.

There is also the problem of "back door" abuses of CRS market power to extract concessions from competitors in other areas, such as interline ticketing charges or control of airport access. Because DOT will have jurisdiction over international markets and because, as we maintain and the House bill provides, it is the logical place for jurisdiction over interline agreements and control relationships, the Department will be in a much better position than FTC to plug those loopholes.

Finally, we are concerned that the FTC may not be in a position to act firmly and expeditiously on the variety of problems that may arise under section 411. Its staff resources, procedures, and limited exposure to transportation issues do not make it as well suited as DOT to tackle the kinds of issues that could arise and require prompt action after CAB sunset. In order to continue the CAB's consumer protection function, the FTC would also require the rulemaking authority contained in sections 204(a) of the Federal Aviation Act, and the power to require safe and adequate service as provided in section 404(a).

Before leaving this point I would like to respond to several arguments that have been made against DOT jurisdiction. We have been told that if the CAB's remaining functions are all assembled in DOT it will encourage reregulation. This concern about reregulation is apparently the principal reason DOT supports FTC jurisdiction. In our view, this is a case where fear has overcome common sense. How will this threatened reregulation come about? Certainly there is no public groundswell for it. And the industry itself would be virtually unanimous in vigorously opposing reregulation. The carriers who join with me today include some of the earliest and most vigorous supporters of deregulation. They are here, and all of us are here, because we want to preserve deregulation. Out concern is that anticompetitive practices, unless checked, are far more likely to lead to reregulation than any organizational grouping of these few residual functions.

The argument is also made that the airline industry is "just like any other industry" and therefore the ongoing interest of the government in consumer protection and unfair competitive practices belongs, as with other industries, in the FTC. To begin with, it is well to recall that there are many industries where such functions do not fall to FTC: banks, buses, drugs, and alcoholic beverages, to name a few. Second, the airline industry is fundamentally different than many others in terms of the opportunities it presents for competitive abuse. There are no other industries where the competitors sell each other's product, transfer customers to each other, lease each other's facilities, or perform various other services for one another the way airlines do. Nor is there any other industry where almost 70 percent of the product is sold through a system of common agents and where a major share of the business—in this case the international portion—will continue to be heavily regulated.

Section 411 is, in the final analysis, a relatively modest piece of legislation. It may or may not be adequate to address the competitive abuses that have been uncovered since deregulation. It is, however, the best medicine currently available to deal with the problems that have been identified. Under those circumstances, we think it would be foolhardy to risk diluting the strength of Section 411 by dividing it between two agencies and assigning a portion of it to an agency that may not be in a position to act as promptly and thoroughly as the circumstances require.

Let me turn now to Sections 412 and 414. Section 412 of the Act provides a process and set of standards for approval of air carrier agreements, and Section 414 authorizes the grant of antitrust immunity for approved agreements. These sections taken together provide the basis for much of the cooperative action among the airlines.

The public benefits stemming from this part of the statute are significant. A good example of this is the set of agreements, called Air Traffic Conference resolutions, which enable dozens of carriers and their agents to sell, carry, and transfer passengers, baggage and freight using standardized procedures for ticketing, handling, appointment of agents, and settling of accounts in domestic air transportation. A similar set of carrier agreements ties together the scores of international airlines into an integrated worldwide system of safe, convenient, and responsible services.

The continuation of such agreement systems is important to the success of deregulation. They enhance rather than impede competition. They have helped to create a truly national air transportation system. The programs enable a new carrier, or an established airline which wants to expand competition, to enter new markets with instant ability to interline effectively with almost all other airlines, to sell its tickets through some 23,000 travel agency outlets, and to settle its accounts in a nationwide settlement plan. The same pro-competitive opportunities are offered by the international program of agreements.

Congress provided for Sections 412 and 414 to survive CAB sunset for both domestic and international air service. As the law now reads, responsibility for these sections will be transferred to the Department of Justice. We feel strongly that such responsibility should go instead to the Department of Transportation.

The policy factors here are essentially the same as those related to Section 411. First, decisionmaking authority should be consolidated, not diluted. Second, the DOT, because of its primary role in air transportation, will be better equipped to weigh the transportation, needs in deciding whether to approve or withdraw approval from an agreement.

Addressing the first point, the need to consolidate jurisdiction, we repeat our grave concern about multi-headed regulation, conflicting regulatory attitudes among agencies, overlapping responsibilities, duplicative staffs, and, in the end, decisions by inter-agency committees. To scatter the centralized authority of CAB among several Executive Branch Departments, DOT, DOJ, FTC, etc., will hardly achieve the objective or less regulation of less intrusion by government.

The danger of overlapping and conflicting authority is particularly serious in the area of international agreements, although it applies to domestic ussues as well. DOT will have broad and direct regulatory authority over international air transportation. Multilateral carrier agreements, involving some antitrust concerns, are fundamental to the international system. The agreements often are considered by foreign government counterparts to DOT to be vital elements of a coordinated air transport system. We want the decision authority consolidated in one U.S. agency. This naturally points to DOT.

The second reason is that DOT will be better equipped than the Justice Department's Antitrust Division to decide whether the various airline agreements should be approved and protected from collateral attack by antitrust lawsuits. This will be the case regardless of which individuals might from time to time hold positions at DOT or DOJ or which political parties may control the administration.

The Department of Transportation will have primary authority over international air services and also that remaining domestic regulatory authority, such as essential air services. In addition, through the FAA's authority to control access to domestic air space, DOT will continue to be involved in the development of domestic air transportation.

These responsibilities will require DOT to be more aware than DOJ of the air transport system's operations, its competitive structure, and benefits to consumers of various airline cooperative programs. The basic issues presented under Sections 412 and 414 are not traditional antitrust legal questions, but, instead, whether immunity for a proposed agreement is justified by the transportation benefits it promises. In our view, the Department of Transportation is better equipped to make that analysis than the Department of Justice.

The airline scheduling committees are good example. These committees have been granted the antitrust immunity by the CAB and have served a usefull purpose in working out slot shortages at certain airports. DOT envisions their continuation. It appears, however, that DOJ would not be prepared to continue the necessary antitrust immunity. DOJ's views on this should be made known to DOT, just as they were to the CAB. But, considering the transportation issues involved, the final decision has to be made by DOT.

In conclusion I would like to again ask that you act as promptly as possible on sunset legislation. Time is running out in this session of Congress. The need to safeguard airline consumers and competition will be just as great after December 31 as it is now. We urge you to put this legislation at the top of the Committee's agenda.

That concludes my prepared remarks. I and my fellow panel members will, of course, be happy to try to answer your questions.

Thank you.

Senator **Kassebaum**. Thank you.

Mr. Rosenfeld.

STATEMENT OF RICHARD ROSENFELD, PRESIDENT, NATIONAL INDIRECT AIR CARRIER ASSOCIATION, AND PRESIDENT AND CHIEF EXECUTIVE OFFICER, INTERNATIONAL WEEKENDS CHARTER VACATIONS, INC.; ACCOMPANIED BY RODNEY E. GOULD, SECRETARY AND COUNSEL

Mr. **Rosenfeld**. Madam Chairman: I am Richard Rosenfeld and I am president of the National Indirect Air Carrier Association, as well as president and chief executive officer of International Weekends Charter Vacations of Boston.

The National Indirect Air Carrier Association includes many of America's leading charter vacation companies, responsible for many millions of vacations for many millions of Americans. International Weekends is one of the largest U.S. charter vacation companies, employing over 400 people.

With me today is Rodney E. Gould, NIACA's secretary and counsel and, incidentally, the person who led the only major investigation by the Federal Trade Commission of the travel industry, from 1976 until 1978, and who is in a unique position to explain the workings of the agency in terms of our industry and what they found and what the problems were.

I had prepared a written statement which I have already submitted to you, and I had also prepared some oral remarks here, which I now must submit as part of the written statement because events have somewhat overtaken my arrival.

This morning, on leaving Boston's Logan Airport I picked up the morning paper, and the lead picture in the Metro section of the Boston Globe is a picture of a man from Jacksonville, OR, sitting in Logan Airport with a word above him: "Stranded." This individual was among 300 individuals who were stranded last night at Logan Airport, where a chartered aircraft of Air National failed to appear to take them on a tour to Greece and to Rome.

The aircraft was—and I will not belabor it to read the entire article, but suffice it to say that it was a tour of Colossus Tours, which is based in Hartford, CT, arranged with Air National, which is an air carrier based in California.

The plane was to leave from Boston, MA. The passengers were from as far away as Oregon, from all over the United States, and the total number of passengers to be flown to Greece and Italy were 491 passengers.

Additionally, the president of Colossus Tours observed that, as a result of the failure of Air National to appear, "I have customers who are stranded in Chicago as well as in Europe. '

The situation really we are discussing here—and I guess I will sort of summarize my oral remarks.

Senator **Kassebaum**. I am anxious to know who can help in that situation.

Mr. **Rosenfeld**. Right. I guess that is the question. Maybe the first question is, should anybody help? Should there be regulation? Are we really talking here about regulation?

After all, I do not think that the credentials of the charter travel industry are to be questioned on the issue of deregulation. It is our opinion that there would be no deregulation in the United States of America at the moment for aviation were it not for the charter tour operators and charter airlines, which during the 1970's and 1960's created such a fuss about allowing the public to have access to inexpensive travel, and in fact took on the aviation establishment.

So I think our credentials are clear on the issue. However, at the same time, we are not really talking about a deregulation issue in terms of allowing charters to compete with scheduled carriers. That issue has been taken care of by deregulation, the Deregulation Act.

We are talking here about protecting consumers and whether the people who take charter flights, who tend to be less affluent than the people who take scheduled flights and therefore, pay a more expensive price, are to be protected when their vacation plans are destroyed, and when they have saved for their vacation and budgeted for their vacation.

And what can be done for these 491 passengers? I might say that the passengers in Europe plus these passengers, the money on that trip alone represents $600,000. And we do not know what is going to happen with Air National's flight tonight from maybe Chicago, or tomorrow night from New York, to all the places in Europe.

That is a real question in the industry at the moment, and I suppose a lot of people here, who is going to help? Well, very fortunately, this industry has a set of regulations now which were developed from experiences in the 1960's and early 1970's when events like this occurred. These regulations were created under part 380 of the Civil Aeronautics Board's regulations and were the result of a public outcry for protection against events such as today's or last night's, and these regulations represent two decades of experience and thousands upon thousands of consumer complaints.

As part of the oral testimony which I have, which will not be my oral testimony, I quote articles which talk about how far our industry has come and what we have learned in terms of making the word charter more respectable as a result of these regulations. And by being more respectable, the charter industry really has been able to be more effective as a competitor to scheduled service.

And I will remind you that in the area of international air transportation, there is no real way to deregulate it. Ultimately, you have bilateral agreements requiring concurrence of foreign governments as to how many carriers fly and what prices they charge. And charters must play an important role in that to constrain prices, and in order for them to play that role they have to be responsibly operated or they will not exist.

The issue here is not whether or not there will be regulation. I assure you that, with these 500 passengers and maybe thousands to follow, that somebody is going to want to regulate that situation.

The question is whether Oregon—this person is from Jacksonville, OR is going to regulate and say this person's money is going to be in an escrow account in Oregon; whether California, where the carrier is based, is going to require this passenger's money to be in California; whether Massachusetts, where the plane was going to leave from, is going to require something; whether each of these people from six New England States and from other States around the country, each are going to have conflicting regulations as to what the heck is going to be done to protect them.

The National Indirect Air Carrier Association that I represent is very much in favor of having a uniform national preemptive system of regulations which allows these passengers to know, as they do now know, what their rights are.

These passengers know that, even though an indirect air carrier such as ourselves is not acting as an agent for an airline and therefore cannot be held—the airline will not stand behind the tour operator—these passengers know that their money is supposed to be in an escrow account; that even with the airline the money is to be in an escrow account for their charter; that they are to be refunded within a certain fixed period of time, which is set again by these regulations.

And I would urge upon you that these regulations must continue and that they should be, in our opinion with the Department of Transportation. You might say, why the Department of Transportation? We have had experience with the Federal Trade Commission.

It cost our industry $5 million, by the estimate of Travel Weekly, which is one of the leading trade publications, to answer subpoenas in 1976, whereupon the Federal Trade Commission did absolutely nothing about it. And in fact Congress, the late Congressman Benjamin Rosenthal, called an investigation of the Federal Trade Commission in 1978 to find out why, after causing the industry so much consternation, so many problems, the FTC failed to adopt any regulations.

What the FTC testified to at the time was that it required specific transportation expertise which the Civil Aeronautics Board had, as opposed to the Federal Trade Commission, and that these things would be better regulated by the Civil Aeronautics Board. And in fact the Civil Aeronautics Board did do in this comprehensive set of regulations.

So let me see if there are any other high points and I will close down here.

I would say that we believe that the decades of experience of the Civil Aeronautics Board with charters are a legacy that should be passed on to the Department of Transportation, hopefully continuing the expertise of people who have observed the charter travel industry over so many decades and in any event have a special understanding of transportation issues.

Last, we hope that, if not in the specific language of the statute then in the legislative history you develop, you will make clear that the Department of Transportation is to provide a comprehensive uniform national preemptive set of regulations, such as those under 380, to govern charter travel by all air carriers, direct and indirect.

Last, I might say, to give you an illustration of the perils involved in our particular industry, again we do not have—when someone pays us for a charter flight—and 1 out of five people who travel to Europe this summer, 1 million people, will be buying their trips from indirect air carriers.

When they pay that money over to an indirect air carrier, the airline does not have to fly those passengers, it does not have to refund any money if something happens to that tour operator. And all you need to do to get passenger money in our industry is print a flyer offering an inexpensive trip, offering to leave several months later, and you get huge sums of money coming in.

My company, for example, has $25 million in consumer money at this moment for trips for tens of thousands of passengers who are to leave over the next several months. That is a situation which in the sixties and seventies invited a lot of demons to get into the business, who as a result of these regulations are no longer in the business, and we would like it to stay just that way.

[The statement follows:]

STATEMENT OF RICHARD N. ROSENFELD, PRESIDENT, NATIONAL INDIRECT AIR CARRIER ASSOCIATION (NIACA)

Madame Chairman, Members of the Subcommittee. My name is Richard N. Rosenfeld, President of the National Indirect Air Carrier Association (NIACA) and of International Weekends' Charter Vacations, Inc. With me is Rodney E. Gould, NIACA's Secretary and Counsel. It is our pleasure to be here today to testify in favor of H.R. 5297.

NIACA is a trade association of tour operators primarily engaged in the charter travel business. Its members include some of the largest and most experienced entities in that market.[1]

NIACA believes that over the years charter travel has proved to be a tremendous benefit to the travelling public in that it has provided and continues to provide extremely low cost, good value air transportation and accompanying land arrangements. Millions of Americans have taken a charter tour over the last few years and millions of Americans have directly benefitted, price-wise, from their ready availability. For hundreds of thousands of these travellers, charters are the only economically feasible way they can travel.

NIACA, as an association, strongly supports H.R. 5297 and, specifically, strongly supports the transfer to the Department of Transportation of full regulatory authority over charters—domestic and international. The reason NIACA supports this transfer is based on the history of charter travel over the last 15 or 20 years.

In the late 1960's and early 1970's some consumers who purchased charters travelled on a very rocky road. Complaints concerning last minute cancellations of charters, unnannounced changes in departure city, unannounced significant changes in hotels or other accommodations and even strandings of people in foreign countries were all too common.

In part, as a result of the growing tide of criticisim addressed against some tour operators, the Federal Trade Commission, in 1976, commenced an industry-wide investigation of the travel industry. Mr. Gould at that time was employed by the Federal Trade Commission and was charged with the task of supervising that investigation. The Commission's investigation into the travel industry was very broad based and included such problems as dramatic changes in hotels on package tours, changes in destination and/or city of origin and the occasional strandings of passengers by less than reputable charter operators.

At the conclusion of its investigation, the Federal Trade Commission chose not to attempt to regulate the charter industry in whole or in part. The Commission's decision was premised on a number of factors, one of which was considerable uncertainty as to the extent of the F.T.C.'s jurisdiction over the aviation industry in general and the charter industry in particular. A second reason for its restraint, and an equally important one, was that the Commission believed that the expertise of the Civil Aeronautics Board with regard to complex aviation matters so exceeded its own that it was logical for the C.A.B. to regulate this industry. Accordingly the F.T.C. staff urged the Civil Aeronautics Board to promulgate regulations designed to provide some stability to the travelling public and at the same time, to the industry. The result was 14 C.F.R. Part 380, et seq. which is, of course, the very detailed body of regulations promulgated by the C.A.B. in 1978 pursuant to 49 U.S.C., Sec. 1301 et seq. and which still governs the minutiae of charter travel.

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[1] NIACA's Members include Carefree David Travel (North Miami, Florida); Fantasy Holidays (New York, New York); G.W.V. Travel (Newton, Massachusetts); International Weekends Charter Vacations, Inc. (Boston, Massachusetts); Transnational Travel (Boston, Massachusetts); Travel 2000 (New York, New York); Travel Committee (Owing Mill, Maryland); Travel Impressions (Glenview, New York); Unitravel Corp. (St. Louis, Missouri); Value Vacations (Winsted, Connecticut); Vacation Travel Concepts (New York, New York); and Wainwright Travel (Bethlehem, Pennsylvania).

Unlike the economic regulations of the C.A.B. which historically, at least some of the time, served no purpose except to make entry into the aviation business more difficut and/or to prevent competition between carriers and between scheduled service and charter service, Part 380 is directed specifically and uniquely at the protection of consumers. And Part 380 is designed to and does service the interests of travellers in all 50 states.

The Part 380 regulations provide, among other things, for escrow arrangements, security bonds, and voluminous filings of various documents before a charter even can be advertised. The importance of the escrow arrangements for example, can not be overstated. Pre-Part 380, tour operators who required payment months in advance of the trip were free to use a passenger's monies as it saw fit—whether it be to pay for aircraft in advance (as is generally required) or to use the money for some wholly wrong purpose (gambling, other business ventures, etc.). The inevitable result, of course, when this type of the operator's funds run out, was the stranding of passengers in remote locations. The escrow requirement sharply reduces these risks, and has given to the industry a previously unheard of degree stability.

Part 380 also requires tour operators to incorporate in their participant contracts certain provisions giving passengers important legal protection—including, for example, the passenger's right of notification and cancellation in the event of certain enumerated "major" changes. At the same time, these regulations give charter tour operators the flexibility necessary to run their charter programs, and thus avoid last minute cancellations in the event unforseen circumstances require changes (for example, the utilization of a smaller plane with fewer seats rather than the originally scheduled larger plane).

While there may be charter tour operators who quarrel with the specifics of any particular C.A.B. regulation, the positive consumer protection impact of these regulations is well recognized within the industry. This Association firmly believes that the C.A.B. regulations have provided significant consumer protection, while enabling reputable charter operators to possess the necessary flexibility to adjust to conditions beyond their control, while, incidently, laying a solid foundation for other reputable new entrants to enter the market place.

The direct result of these regulations has been a tremendous decrease in the number of significant consumer complaints (i.e. strandings, suprise arrivals in a country different from that expected and the like) and the maturing of the charter tour industry to the extent that charter travel now is an accepted and widely preceived cost beneficial means of travel. But for these regulations, I fear the charter industry could not provide that high level of low cost, quality vacations it now provides.

Under the Airline Deregulation Act of 1978 jurisdiction over international charters will shift to the Department of Transportation commencing next year. It can reasonably be expected that in due course, the Department of Transportation would become as expert in aviation matters as is the C.A.B. Hopefully many of the very competent C.A.B. staff, still with that agency, will shift to the Department of Transportation, and in their new titles perform the same type of job they have done so well in the past and which has inured so directly to the consumer's benefit.

But under the existing Act, DOT would not inherit jurisdiction over domestic charters. Bifurcating the regulatory jurisdiction between domestic and international charters would be a mistake. It would cause considerable turmoil in the domestic charter market with no offsetting gains—except perhaps to a few unscrupulous operators. While the Department of Transportation would no doubt retain much if not all of the present C.A.B. regulatory scheme, there would be no comparable protection for consumers on domestic charters. Obviously, there is no logical reason for differentiating between the type of consumer protection necessary on the basis of the destination of a charter tour. Thus travellers who planned vacations to Hawaii, Las Vegas, or San Juan would be without protection save that which the Federal Trade Commission in its general regulatory authority might possess, or that which the various states under their local consumer protection statutes might choose to assert. The result would be utter chaos.

Whether the Federal Trade Commission would ever again investigate this industry, or if it did promulgate industry wide trade regulation rules—a terribly complex ordeal—is at best dubious. Moreover, there exists grave questions whether that agency would even have the legal authority to require escrow arrangements, bonding and the like. Even worse, and in the real world most probable, what would be legal in one state could well be illegal in a second and of unclear legal status in a third. In some states, with inactive consumer protection units, travellers would have no protection at all. Most large reputable charter operators are multistate in character. Most simply could not survive operating under 50 different regulatory schemes. On the other hand unscrupulous operators could pack up and move to a "friendly" state and effectively insulate themselves from all regulation—perhaps until the day thousands of their passengers are left stranded somewhere.

Uniformity of regulation, more than anything else, has been the prime reason charters are as successful as they are today, and why so many millions of Americans receive extraordinary good value vacations as a result of them. We urge this Committee to enact H.R. 5297 so that the Department of Transportation will have the flexibility to keep or modify uniform, nationwide charter regulations regardless of whether the charter be a domestic or an international one.

It has been a pleasure for us to appear before you today. If there are any questions, we would be happy to respond.

Senator Kassebaum. Thank you very much.

I might start with you, Mr. Rosenfeld, since you finished. And it certainly is an interesting story that you used to illustrate what really I think is a growing problem to a certain extent, as there are so many more international travelers who do take advantage of quite extraordinary offers on charter flights.

Are you saying that, based on your past experience with the FTC, that you believe that these consumer functions could go to DOT, or are you implying that they should not go anywhere?

Mr. Rosenfeld. No, we are implying that they should be taken over by the Department of Transportation.

Senator Kassebaum. Transportation.

Mr. Rosenfeld. As well as taking over all the other functions that are being transferred to them, making it a cohesive unit. That passenger who came in from Oregon might have come in on a charter flight from Oregon to connect with his flight in Boston. We do not think you can separate his flight from Oregon from his experience in Boston.

We think that is basically impractical, and we think that, frankly, the more transportation issues in aviation you consolidate under the Department of Transportation, the wiser I think will be all of the aviation decisions that are made. And let me give you just one example.

At the time when the Deregulation Act of 1978 was passed, a very peculiar act, if I might editorialize and say, was passed at the same time, which in effect is going to do enormous injury starting at the beginning of next year, exactly coincidentally, the same date, as the sunset of the CAB. And that is an act which I think is called the Aviation Safety and Noise Abatement Act of 1979, which was a companion bill.

That bill effectively, under the guise of noise regulation protecting a few people at three different airports, is going to take away all of the inexpensive narrow-bodied aircraft that can fly the North Atlantic from the charter fleet. These are the inexpensive planes that deregulated carriers would use.

So what is going to happen to our industry starting in January of 1985 is something very traumatic. The risk-reward ratio, the whole thing is going to change. You will have to fill wide-bodied aircraft across the North Atlantic, and if you fail you are going to have more situations like the event that I reported to you in Boston yesterday.

We have an industry that is going to become much more perilous starting the beginning of next year, unless some exemptions are granted by DOT. We think if DOT were more sensitive and understood the implications of a noise situation, for example, as compared with in terms of the impact it could have on the whole competitive role that charters must play in the North Atlantic, for example, where there is no deregulation, you would not have bills in different areas of aviation which do damage without people understanding perhaps the damage that is being done.

Senator KASSEBAUM. Well, when I came I got in on sort of the tail end of the question of noise abatement, and I guess that when you say over the North Atlantic, of course, there is not a problem with noise.

But one of the difficulties, I think, is that in an effort to try and control the situation around our major airports, the older planes are obviously the noisy planes. I do not think it is wide-bodied versus narrow-bodied so much as just the older planes are noisier.

Mr. ROSENFELD. I think you may find that the price for avoiding that noise is a change in the entire structure of aviation costs for Americans starting next year in their international travel as well as in some of their domestic travel.

And while the number of people living around those three airports in question—and this is a national bill that was adopted—is a significant number of people, you have to compare that number with the millions of people who are going to travel next year and pay a price reflecting the protection of those people.

I am very hopeful that DOT, by reaching out and seeing what role charter travel has to play in the industry, will be able to evaluate better very much interrelated issues.

Senator KASSEBAUM. Thank you very much.

Mr. Hitchcock, I would like to ask you because, as a long-time advocate and watchdog of aviation consumers, you have been very involved with the CAB, in their rulemaking procedures and in the rule implementations that have followed from those procedures.

I would like to ask you what you see as being necessary in the way of people or procedures, if this should go to FTC, to assist in a good effort there or in assumption of the role that the CAB has?

Mr. HITCHCOCK. Well, I think the testimony this morning——

Senator KASSEBAUM. Or a way that it could be improved, I should say.

Mr. HITCHCOCK. I think we have in the past quibbled with some of the things that the CAB has done or failed to do with respect to particular regulations with respect to the substance. But as for the procedures, I think it could be handled in the same way that some of the other procedures, such as international aviation and essential air service, are handled, which is simply take existing personnel and transfer them to whichever particular agency.

I think Chairman Miller and Mr. Scocozza both indicated that there is not a large number of people who are actually doing the work, such that you are going to be expanding the staff inordinately. I think the key question with respect to procedures is to make sure that it continues using informal rulemaking.

Let me make a point on the Magnuson-Moss and why that is the way it is. Back in the mid-1970's, Congress expanded the jurisdiction of the FTC to give it the authority to move more broadly in a number of new areas, and the Magnuson-Moss procedures were slapped on as a protection to make sure that the FTC did not venture terribly far into left field.

With respect to a lot of the airline regulatory issues—overbooking, package tours and so forth—the agency, the public, the industry, have all been around the track a few times on these issues, and I do not think that you need, therefore, to have proceedings that go on for 8 years, where people come in and tell about the problems they had with their charter trip, or problems they had when somebody blew smoke in their face, or problems they had with baggage liability limitations.

I think you can do that with the current procedures that the CAB follows, regardless of which agency you give it to.

Senator KASSEBAUM. I gather from your testimony you do favor DOT?

Mr. HITCHCOCK. Well, as I said, you can choose arguments either way.

Senator KASSEBAUM. That is probably why you agreed with his testimony, Mr. Mathias. It was a very diplomatic presentation.

Mr. MATHIAS. I thought it was more clear cut. I thought he gave a lot of good reasons why it should go to DOT. I did not hear anything for FTC.

Senator KASSEBAUM. Given, as I say, your long experience with CAB, I would really like to have your analysis of: one, what can be done for improvement; and two, given the fact the FTC focus certainly is on consumer interests, why you would not feel that it indeed should go, without any equivocation, to FTC.

Mr. HITCHCOCK. Why the consumer protection functions should not go?

Senator KASSEBAUM. Yes.

Mr. HITCHCOCK. Well, there is an argument. I mean, our concern about which agency is really a pragmatic consideration. The point I was trying to make in the testimony, I think, is that you can make an intellectual case for either agency.

If you were regulating an area where you had unfair and deceptive practices rules, but not rules, like smoking or the access to the handicapped, then I think probably the FTC would be a fairly clear choice. If you did not have the problem of domestic versus international, then FTC would be a fairly clear choice.

The problem that the Congress faces is that you are not writing on a clean slate. There is a lot of history that has occurred over the last 40 years by having an industry-specific agency that has focused on the two types of rules.

If Congress does want to give these additional things like smoking and international functions to the FTC, I think you could devise a system that would work. But the problem is, from a pragmatic standpoint, that might be more complicating and make it more difficult to get a bill through. Faced with that alternative, we think that DOT could probably do the job just as well.

Largely, you are taking the same personnel who are doing the job. And I guess I am not sure that we share the notion that DOT is somehow going to be more reregulatory than the FTC. Other witnesses have commented that administrations change, you know, this year's FTC can be very proconsumer, next year's FTC might be somewhat less so. The same with DOT.

So in that sense, the intellectual case for giving a lot of the pure competitive issues to FTC is there, but it is more complicated than simply the section 411 sort of issues.

Senator KASSEBAUM. Thank you very much.

Mr. Mathias, did you have something?

Mr. MATHIAS. One comment, if I may. As I understand the makeup of the CAB now prior to sunset, the consumer affairs people are not divided sharply between international and domestic, and so you are going to have the issue of how many or which of those go to DOT to handle international airline consumer affair matters if you adopt the idea of sending some of them to the FTC.

I would also like to note for the record that there may be an incorrect impression left this morning from the testimony, that there are only 15 people involved in consumer affairs and it does not make too much difference which way they go, they can go as a group. As just pointed out, they might have to be split in half if some go to FTC and some to DOT.

Also, there are a large number of other professionals at the CAB who are intimately directly involved in the consumer protection and the unfair competitive practices roles of the Board. I believe—I may be wrong, because they were not not specific as to which 15 they were describing this morning in their testimony. But I believe those are the people that are in a certain specific enforcement type function, primarily related to going after such things as denied boarding abuses or smoking in the wrong compartment type things.

The people that write the rules and prepare the staff analyses for the Board members and sit with the Board members and advise them on policy in consumer protection matters would not be included in those 15. And those people in all likelihood are going to be over at DOT.

So you are not really looking at a small select group of 15 who are a self-contained unit in the Board, who are perfectly capable by themselves of handling consumer affairs, and just taking them and putting them over at FTC. You would be carving out only one appendage of a Boardwide, almost, consumer affairs and anticompetitive practices group.

Senator KASSEBAUM. I would like to ask you to comment on Mr. Lazarus' statement that a couple of years ago all of the industry was supportive of the consumer authority going to FTC, now the industry is split. What in your mind has caused that difference?

Mr. MATHIAS. Well, I think that it has been identified. In the past 4 years, the rise of the issue of the computer reservations systems has become of paramount importance to the 20 airlines that I am speaking for here this morning, as it became more and more apparent that, as a result of the 40 years of nurturing by the Government under the regulatory system, the giants, United and American, were holding control over the key form of this industry's distribution of its tickets.

As I mentioned in my testimony, the large preponderance of airline tickets are sold through agents, and more than half of all tickets sold in the United States are sold through agents who use either the American and United computer res systems.

They have begun in the past 4 years to develop the more sophisticated uses and abuses of those marketing systems, and it has become a critical question to the airlines now, whereas 4 years ago it was not.

Senator KASSEBAUM. This is really the only issue?

Mr. MATHIAS. I think it is the issue that galvanized us into looking at this situation. Now, most of the other airlines are not that concerned about whether the Government continues to regulate smoking. Frankly, most of us think that we could handle that in the marketplace ourselves.

Many of us do not sit up at night hoping that the Government will handle baggage liability issues. We think we could probably, many of us, handle those ourselves as businessmen.

Nevertheless, we are beginning to recognize that, if the Federal Government does not continue to regulate those issues, then the States will. And as Mr. Rosenfeld said with respect to the charter rules, we are facing a very, very serious Federal preemption issue, and it now appears that if you are going to have Federal preemption you must have the Federal Government occupy the field.

You cannot just have Congress pass a law that says, the States shall not mess around with charter rules, the State shall not mess around with baggage liability rules, and then not have some Federal agency occupy the field by promulgating rules.

So we feel that, while we always felt Federal preemption was a critical issue, we now recognize that it is important for——

Senator KASSEBAUM. That it is better than State preemption.

Mr. MATHIAS. Well, yes, that is right. Federal preemption was always important because it was the only way to block inconsistent, overlapping State, multi-State rules. And if you are going to have that, then you need to preserve a Federal power, located in an agency, to deal with the consumer rules.

Senator KASSEBAUM. Well, I would share that concern with you, and really the point of this whole hearing has been whether, of course, this can best be handled at FTC or DOT. And my concern is not just one issue, such as CRS, and I would hate to see this tend to become a focus because I do not think it helps us answer then the question of where this authority can best lie and where it can be most efficiently handled.

And that is my prime concern, and I believe it is for all of us, really, because no one, or very few, would want to see reregulation, and I do not think there is anyone who feels that on the whole to just totally go back in and reregulate is the answer.

I think, as we have looked at all of our efforts in deregulation, whether it is trucking or the railroads or the airline industry, the financial institutions and so forth, we realize that you cannot just end it overnight; that there are certain aspects of handling it, I think, in a constructive manner that really does lend to some certainty and security for the consumers as we move into a very different arena.

It has provided many benefits, but there are many consumers who also really do wonder if it is serving them well. And I think we all have a responsibility to make sure that it does and that we do maintain the best course possible to answer those concerns to the general thrust of the ADA Act.

I am sure that all of the testimony that we have gathered here this morning is important to the understanding of this. I think clearly from the chairman's statements, Senator Packwood and myself, it is obvious where our thinking at this point comes from and, while I would not want to presume to have a closed mind at all on the issue, I do feel that we share certainly a belief that we should mark this up just as quickly as possible, because I think that the longer this issue floats around, the more divisive it may tend to become.

Thank you very much for your testimony today.

Mr. LAZARUS. Thank you.

Mr. HITCHCOCK. Thank you.

Mr. ROSENFELD. Thank you.

[Whereupon, at 11:17 a.m., the subcommittee was adjourned.]

ADDITIONAL ARTICLES, LETTERS , AND STATEMENTS

STATEMENT OF THE AIR TRANSPORT ASSOCIATION OF AMERICA

The Air Transport Association of America, whose 32 U.S.-member airlines constitute the major segment of the nation's airline industry, appreciates this opportunity to comment on the Civil Aeronautics Board sunset legislation being considered by the Aviation Subcommittee.

As we pointed out during the Subcommittee's oversight hearings last June, airline views on deregulation varied extensively in 1978. Nevertheless, the airlines quickly adapted to the new challenges and opportunities provided by the enactment of the Airline Deregulation Act of 1978. If any philosophical reservations remained about the wisdom of Congress' action, they were quickly set aside in the effort to find how best to conduct airline operations and meet public needs in the new competitive environment.

There continue to be differing views within the industry on some aspects relating to CAB sunset. These differences are certainly understandable in view of the realities of the highly competitive world in which the airlines exist.[1] But ATA wishes to reaffirm the underlying principle of its testimony last year: federal economic regulation cannot now be reimposed without making a complete shambles of the air transportation system. We strongly oppose such reregulation. It is for this reason that we share the concern of the Administration and of some in Congress, that sunset-related legislation could become the vehicle for attempts to reregulate the industry.

The airlines believe that there are several essential legislative matters that should be considered if sunset-related legislation moves forward. This statement legislation moves forward. This statement will address those matters, as well as one proposal that we understand may be raised and which we strongly oppose. Our detailed views on these matters follow.

INTERCARRIER AGREEMENTS AND ANTITRUST IMMUNITY

H.R. 5297 transfers to the Department of Transportation jurisdiction over Sections 412 and 414 of the Federal Aviation Act. Section 412 of the Act provides the CAB with the authority to examine and approve inter-carrier agreements and Section 414 of the act gives it the authority to immunize those agreements from the antitrust laws. Absent enactment of H.R. 5297, jurisdiction over those provisions of the statute will be transferred to the Department of Justice on January 1, 1985. We believe that the Department of Transportation, rather than the Department of Justice, should be the recipient of that authority.

Sections 412 and 414 provide important benefits to the travelling public and the airline industry. It is through these provisions that the airlines conduct various joint activities that are so essential to our efficient provision of services to the public. The best-known current examples of these activities are the scheduling committee agreements to enable operating opportunities at high-density airports, the scheduled airline ticket office program at military installations, and the travel agency program and its concomitant area settlement plan. Historically, the antitrust immunity conferred by the CAB pursuant to these sections has proved to be essential for holding vital airline discussions at the time of the machinists' strike against five carriers in 1966 (CAB Order E-23932, July 9, 1966, 45 C.A.B. 837), and during the PATCO strike in 1981 (CAB Order 81-6-146, June 19, 1981), as the airlines struggled together to operate a shrunken air transport system in the national and public interest. Similarly, antitrust immunity has been recognized as a since qua non to effective airline preparations for moving essential cargo during periodically threatened longshoremen's strikes at our nation's ports which, in the extreme, could cripple our nation's economy. History teaches that such emergency needs for antitrust immunity will recur, and it is impossible and indeed not meaningful to attempt to forecast every such occasion. The sum, in our view, is that there are now and will continue to be instances when Sections 412 and 414 provide essential powers for use by an expert agency.

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[1] American and United differ in certain respects with the ATA statement and will submit their views in this connection separately. A number of other ATA member carriers will present supplementary views based upon the ATA testimony.

We submit that DOT is the appropriate agency to possess jurisdiction over Sections 412 and 414 because the determinations that are made under these statutes demand transportation expertise. Such expertise should not and cannot be expected from an agency with the specialized role of enforcing the antitrust laws. The continued effectiveness of these provisions requires that they be vested in an impartial manner. The agency that receives this authority must be committed to its appropriate use. It must be willing to engage in the delicate balancing of transportation needs and public benefits, on the one hand, and anticompetitive consequences on the other. We have misgivings about the Antitrust Division of DOJ, with its otherwise clear and overriding enforcement goals, receiving authority that is alien to its institutional mission.

Our discussions with DOJ officials about this matter, although characterized by commendable candor, did not allay those misgivings; on the contrary, they reinforced them. The essence of the Antitrust Division's views may be summarized quite simply as follows. If a domestic agreement does not seem to pose an antitrust problem, it will not be immunized because that would be unnecessary. If a domestic agreement does seem to pose an antitrust problem, it will not be immunized because that would be inappropriate. Lastly, immunity limited to preventing recovery of treble damages might be considered where the conduct has been or is likely to be the object of vexations antitrust litigation. The airlines are generally uncomfortable with those views of the Justice Department, in which they perceive at least two shortcomings.

First, Sections 412 and 414—especially Section 412—are highly structured statutes in which Congress expressed with particularity the discretion that could be exercised under them. Congress explicitly recognized in these provisions that certain carrier agreements which had significant antitrust implications should be permitted if they secured important public benefits or met serious transportation needs. Unfortunately, the philosphy that DOJ has expressed in its discussions with us and in its January 5, 1984 memorandum to DOT on this subject, as amended on February 10, 1984, is at odds with that Congressional recognition.

Second, DOJ stated in that memorandum that it intended to encourage airlines not to file domestic applications. This suggests that DOJ expects that those two provisions will fill into disuse insofar as domestic agreements are concerned. Predictably, a governmental policy that actively discourages Section 412/414 applications will diminish greatly the willingness of airlines to enter into or continue important joint programs which benefit the travelling and shipping public.

Regrettably, DOJ's March testimony before the House Aviation Subcommittee did not dispel our concern about its administration of Sections 412 and 414. Indeed, its announcement in that testimony of its intention to employ partial, rather than full, antitrust immunity under Section 414—i.e., immunizing a transaction from a treble-damage suit but not from an injunctive suit—heightened our apprehension about the future vitality of that provision.

FEDERAL PREEMPTION

A second area of considerable importance to the airline industry is federal preemption.

Congress recognized in 1978 that contradictory and burdensome state regulation of airline activities could threaten the success of the Airline Deregulation Act. It responded to this threat by adding to the Federal Aviation Act Section 105, which is its preemption provision. This provision has been quite helpful. We believe, however, that it must be clarified and strengthened for effective use after sunset.

We are concerned that, if we enter the era of complete domestic economic deregulation with insufficient federal preemption of the field of our activities, onerous and inconsistent state economic regulation of interstate commerce could develop. Such a development would not only frustrate the objectives of the Airline Deregulation Act, but also trigger the automatic and unintended impostion of a host of burdens which the Congress and state legislatures have consciously decided not to impose upon the industry.

We have identified three major preemption-related problems.

First, the preemption provision of Section 105 applies only to air carriers holding title IV authority. By definition, this refers to CAB-issued certificates and exemptions which, under the terms of the Airline Deregulation Act, post-sunset new entrants will not be able to secure from any successor agency. Furthermore, because Section 47 of the Deregulation Act (the savings provision of that Act) raises questions about the effectiveness of existing domestic certificate and exemption authority after sunset, airlines that currently hold that authority may not be able to rely with total confidence upon that provision either. In the hearings which led to the ultimate adoption of H.R. 5297 by the House, we proposed that this situation be corrected by amending the law to assure premption either through the present or future holding of an air carrier operating certificate issued by the Federal Aviation Administration under section 604 of the Act or the holding of a certificate of public convenience and necessity on the date of enactment. This equitable change would protect both existing and future air carriers.

However, the House chose another approach to solving the problem—two complementary amendments which also are designed to protect both existing and future air carriers by declaring that any reference in any law to a public convenience and necessity issued by the CAB shall be deemed to refer to certificates issued under section 401 or 418 of the Federal Aviation Act. The other amendment preserves the existing fitness finding for Section 401 or 418 authority by transferring the function to the Department of Transportation. This latter measure would provide preemption protection for carriers that come into existence after the sunset of the CAB. The airline industry recognizes that the consuming public and the nation would be badly served by any action which opened the door to "fly-by-night operators" in air transportation. Therefore, so long as sound safeguards are adopted to insure that preservation of a fitness test is not the seed for route reregulation, we do not object to the House approach for clarifying and strengthening the intended federal preemption after sunset.

Second, the House bill includes another provision which the airlines feel is vital to insure against a maze of conflicting judicial and regulatory decisions in the 50 states. This federal preemptive measure amends Section 411 of the Federal Aviation Act to assure uniform notice requirements concerning the incorporation-by-reference of ticket terms, in accordance with federally established regulations. The CAB has issued incorporation-by-reference rules. They protect the consumer and enhance the efficiency of ticket transactions. We believe that the interests of passengers and airlines will be advanced if there are uniform provisions for incorporation-by-reference after sunset. ATA therefore urges adoption of this amendment.

Third, the demise of the domestic certificate of public convenience and necessity could arguably affect the application of a host of state laws to airlines which refer to the possession of such a certificate (e.g., tax laws, liquor laws and blue-sky laws). Congress clearly did not intend that the application of these state laws would be altered by the CAB's sunset. Moreover, at least one federal law which plays a vital role in continuing the economic viability of the airline industry has a similar link to the possession of a certificate of convenience and necessity issued by the CAB. Specifically, Section 1110 of the Bankruptcy Code (11 U.S.C. § 1110) assures that a bankruptcy court will not block lessors and conditional vendors from possession of certain leased, conditionally sold, or liened aircraft and aircraft parts in the event of a Chapter 11 reorganization of an airline. In codifying the bankruptcy law in 1978 (Public Law 95-598, November 6, 1978), the Congress specifically recognized that this protection was necessary to assure the continued interest of financiers in assisting aircraft and equipment purchases. The need for that protection is just as keenly felt by the airlines and financial institutions today. Again, as in the case of the myriad state law provisions tied to the possession of pc&n certificates, either the original ATA suggestions or the alternative approach adopted by the House takes care of the problem; the important thing is that this clarification and strengthening of the federal preemption provisions be addressed now, to avoid the foreseeable confusion in 1985.

COMPETITIVE AND CONSUMER PRACTICES

The subject of competitive and consumer practices is closely related to preemption. The CAB has engaged in an extensive competitive and consumer practices program. It regulates such practices as oversales, baggage liability, and incorporation by reference of ticket terms.

There is general agreement within the industry that federal responsibility for these matters is far preferable to the potentially inconsistent demand of state regulation. Our belief in the need for uniformity in these matters convinces us that a federal agency should assume at sunset the CAB's responsibility over these practices. It is of utmost importance that only one agency assume that responsibility.

Where that responsibility should be lodged is something about which our members have differing views. Many of them believe that DOT should assume it. They reason that since DOT will have the responsibility over all international matters, including competitive and consumer practices, and for essential air service under the Airline Deregulation Act, it is the most appropriate recipient of the authority over such practices domestically. Other members believe that the Federal Trade Commission should receive that authority. They reason that competitive and consumer protection authority should be transferred to the agency that today exercises such authority over other unregulated industries. We understand that both views will be fully elaborated by some of their proponents in the subcommittee's hearing.

There should be only one agency responsible for consumer-protection matters. Dual consumer-protection jurisdiction would result in airlines being subjected to conflicting rules and policies, and consumers uncertain about which agency to turn to for assistance. Consequently, to avoid such predictable confusion, oversight of this area must reside exclusively with one agency.

POSTAL MATTERS

After sunset of the CAB, the Board's authority to set rates for foreign air transportation transfers to the Department of Transporttation. With regard to the transportation of international mail, the Postal Service will continue to tender the mail in accordance with the rates set by DOT. Historically, U.S. mail has been carried on U.S.-flag carriers where such service is available. However, Section 405(e)(2) of the Federal Aviation Act permits the Postmaster General to contract with foreign air carriers "in any case where service may be necessary."

Several months ago, the Postal Service awarded contracts to four foreign-flag airlines to carry U.S. mail in six U.S.-foreign markets. It did this despite the fact that, in each market, at least four U.S.-flag airlines bid to carry the mail. We do not believe that the Postal Service should award very valuable contracts to foreign-flag airlines where U.S.-flag airlines are ready and willing to carry the mail.

U.S.-flag airlines substantially assist our balance of payments position and are a vital standby resource for our national defense. In the international arena, U.S. carriers can be seriously disadvantaged in efforts to compete with foreign airlines which enjoy the strong support or subsidization of their governments. With such assistance, they can afford to offer services substantially below costs.

It is for these reasons that the Congress has previously provided appropriate support for U.S.-flag airlines.

The International Air Transportation Fair Competitive Practices Act of 1974 established a "Fly-America" program, requiring federal agencies to use U.S.-flag airlines to transport government passengers and property between the United States and foreign locations where their service is available. That law also amended the International Travel Act of 1961 to provide for promotion by the Secretary of Commerce of travel to and from the United States on U.S. carriers. During the consideration of the International Air Transportation Competition Act of 1979, Congress stated that "U.S. carriers should be used unless a situation arises which obviously dictates the use of a foreign air carrier to avoid undue delays."

The airlines urge the Congress, consistent with its previous actions and views, to amend Section 405(e)(2) to permit the Postal Service to contract with foreign air carriers for the transportation of mail only where U.S. carriers provide inadequate capacity. The airlines believe that this additional measure is in harmony with U.S. aviation policy. It will assure that the best interests of the nation are served by providing that a balance is maintained in the international air transportation arena.

DATA COLLECTION

Section 407 of the Federal Aviation Act empowers the Civil Aeronautics Board to secure a broad range of traffic and financial data from the airlines. Under this section, the Board also is authorized to prescribe the details, content and form of reports, to secure copies of contracts, agreements and understandings between airlines and any person with regard to any traffic affected by the provisions of the Act, to require disclosure of airline stock ownership and of holdings of airline officers or directions, to prescribe the form of airline accounts and records, and to inspect airline accounts and property.

The Airline Deregulation Act of 1978 transfers at sunset Section 407 authority to DOT insofar as foreign air transportation is concerned. However, it neither transfers nor repeals domestic Section 407 authority, with the exception of stock ownership reports which we discuss below. H.R. 5297 transfers most Section 407 authority—domestic and international—to DOT at sunset.

The Airline Deregulation Act of 1978 eliminated, on January 1, 1983, those provisions of Section 407 requiring stock ownership disclosure in domestic air transportation, but did not do so for international air transportation. H.R. 5297 would eliminate this discrepancy between domestic and international air transportation with respect to stock ownership requirements by eliminating the provisions in their entirety. The airlines endorse such an amendment.

In addition, the House bill narrows the CAB's right of access to the lands, buildings and equipment of air carriers under Section 407(e) to access necessary for a fitness determination under Sections 401, 402, 418 and 419. We believe this limitation is clearly warranted and we strongly support that provision. However, we continue to feel that the remaining unlimited access under Section 407 to accounts, records and memoranda kept by air carriers, foreign air carriers and ticket agents that H.R. 5297 would provide is unwarranted in the deregulated environment of the future. Such powers over private companies may arguably have had some justification under the rigorous public utility-type regulation applicable to the airlines before deregulation but not now.

History documents that implementation of Section 407 over the years has duplicated reporting requirements imposed by other agencies and necessitated the creation of special reporting procedures to satisfy CAB desires. Often these requirements have been of no value to the carriers and have been extremely costly to provide. Form 41 financial and accounting reporting requirements are perhaps the most egregious examples of such demands and they should be eliminated.

We recommend that Section 407 of the Federal Aviation Act be amended to eliminate, effective on the date of enactment of CAB sunset legislation, all stock ownership and contractual disclosure requirements, all non-traffic data reporting requirements (i.e., Form 41 reports), all authority under the Act to prescribe the form of airline accounts and records, and all such authority to inspect airline accounts and property.

FARE DISCRIMINATION

Section 404(b) of the Federal Aviation Act authorized the Civil Aeronautics Board to regulate unjustly discriminatory fares. Its domestic authority under that provision ended on January 1, 1983.

Several parties have suggested that that measure be resurrected in some form so as to provide the Department of Transportation or the federal courts, or both entities, with the authority to make determinations about differences in fares among domestic markets. The airlines strongly oppose those proposals.

Considerations of principle and practicality dictate that the unjust discrimination provision not be resuscitated in any form. The proposals to revive Section 404(b) may have superficial appeal to some. In reality, however, they could not be implemented without reregulating airline fares at the expense of the many travellers who have benefitted from the availability of innovative fares and services due to deregulation.

The impetus for these proposals seems to be the assumption that a federal authority, whether it is an agency or a court, should apply the utility regulation principle of fare equalization after deregulation.

That assumption fundamentally contradicts the goals of Congress when it enacted the Airline Deregulation Act of 1978. Congress deregulated the domestic airline industry because of its conclusion that the competitive marketplace is superior to the judgment of a governmental entity in determining the proper level of passenger fares.

Proponents of unjust discrimination legislation fasten upon market distances as the criterion for evaluating the reasonableness of fares. However, many more factors than the distance of a flight affect an airline's costs. The density of the market, whether business or vacation traffic predominates in it, the seasonality of the market, the quality and the variety of the service that the airline offers, the equipment operated in the market, labor, fuel and other costs, and the airline's objective in serving the maket all directly affect its costs.

The diversity and complexity of these factors clearly indicate the difficulty that would be inherent in making a determination witn regard to precisely what is discrimination. If a government agency were responsible for making such a finding, it would probably establish a methodology to evaluate fares that were subject to discrimination complaints. This would be complicated undertaking, which would require considering a plethora of economic factors, and would reestablish regulatory criteria for domestic fares. That effort would spawn a bureaucracy that would be assigned the task of analyzing and determining whether such fares meet the established regulatory standards. That is precisely the type of situation that the Deregulation Act was intended to eliminate. If, on the other hand, courts were responsible for making such findings, there would be a pronounced danger that inconsistent, ad hoc determinations would result. In either event, proceedings under a revised Section 404(b) would require airlines to provide expensive economic and legal expertise to defend their fares.

We believe that the Section 404(b) proponents will be disappointed if their proposals are enacted into law. Their concern is quite understandably concentrated upon activities in modest-sized markets. Airlines, however, will have additional concerns. They will be concerned about the effect of an unjust discrimination finding in a smaller market upon their operations in larger markets; about the effect of such a finding upon not just their fare levels but also upon their fare structures; about the release of sensitive proprietary information in Section 404(b) proceedings; and about the costs of participating in such proceedings. Introduction of these types of concerns into airline decisionmaking is unlikely to produce benefits for modest-sized markets, but could affect decision-making on matters involving route structures and market patterns.

We strongly urge the Congress to reject any suggestion to revive Section 404(b).

CONCLUSION

In conclusion, the Air Transport Association urges the Subcommittee to reject any proposals to reimpose government economic regulation of domestic air transportation. Our domestic routes and rates must be left to the competitive dictates of the marketplace, as Congress intended in enacting the Airline Deregulation Act of 1978. The amendments which we do support in this statement are, we believe, fully consistent with that Congressional intent, and in the national and public interest.

STATEMENT OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

Madame Chairman, the American Society of Travel Agents, Inc. (ASTA) is the world's largest trade association of professional travel agents, with over 12,000 domestic agent members and a total worldwide membership of agents and suppliers of about 20,000. We appreciate the chance to address you about the important issues that face use as the sunset of the CAB approaches.

We will limit our remarks to two issues: (1) jurisdictional issues related to airline agreements and antitrust immunity and (2) issues related to the future of consumer protection regulations.

ASTA's view of the importance of antitrust immunity in the airline industry is well known. We believe that such immunity is necessary to assure the continuation of airline cooperation and coordination that benefits the travelling public. The most immediate example is the travel agency accreditation program operated domestically by the Air Traffic Conference and internationally by the International Air Transport Association. These are the subject of legislation pending before both houses of Congress and will not be discussed in detail here.

Retention of the power to grant antitrust immunity to airline agreements is important for other purposes as well. It will provide a useful measure of flexibility in the event of unforeseen developments following the sunset of the CAB, in situations where competitively sensitive agreements may be necessary in the public interest but thwarted by industry perceptions of legal exposure that overwhelms the private interest in the agreement. The Congress should therefore provide the tools to address these situations effectively.

It might seem that both of these concerns are already addressed in the provisions of the Federal Aviation Act that transfer the authority to approve and immunize agreements from the CAB to the Department of Justice at the end of this year. Unfortunately, the existing arrangements for transfer are unlikely to provide the necessary safeguards and we therefore believe that legislation is essential.

The Department of Justice is by its nature an antitrust enforcement agency and thus not well constituted to consider the public policy issues that arise in connection with requests for immunity as to airline agreements. The Department will have no other on-going policy responsibility for the airline industry and will thus not be as well informed in these respects as an agency that does have such responsibilities.

The Department's ad hoc use of Business Review Letter procedures to state its current enforcement intentions when presented with requests for same is no substitute for the administrative review and expertise that can be accumulated by an agency with broader policy authority for a particular industry. The Business Review Letter inherently focuses on antitrust issue arising under the statutes for which

Justice bears primary or sole responsibility for enforcement and can not be expected to serve as an effective substitute for applying the surviving policies of the Federal Aviation Act in the context of an agreement raising complex transportation policy questions.

In documents disclosed in the Department of Transportation's Sunset Plan for the CAB, the fundamental hostility of the Department of Justice to the effective administration of sections 412 and 414 is clearly revealed. The Justice Department's basic view appears to be that sections 412 and 414 have little utility after 1984 and therefore the industry must be discouraged from even seeking relief from the Department thereunder. As a practical matter Justice is saying that "no one need apply" because no immunity will be forthcoming in any case where such immunity will be likely to have meaningful effects in the market.

For all of these reasons, ASTA believes that legislation should be enacting transferring the section 412/414 jurisdiction from Justice to the Department of Transportation. While DOT appears to be reluctant recipient of this authority, it remains the proper repository of it, since it alone will have the overall transportation policy responsibility for the air transport industry after termination of the CAB.

ASTA is also quite concerned about the fate of the Board's authority to issue regulations intended to protect consumers, as currently embodied in section 411 of the Federal Aviation Act. We believe that continuation of this function is vital. The most current example of this need is the regulatory scheme currently being considered by the Board for control of computerized reservations services used by travel agents. It is reasonably safe to say that the Board will adopt final rules in this area before the year is out. We have considered DOT's position that the authority to continue those regulations will pass to the Federal Trade Commission and find it questionable at best. The only safe course here is to enact legislation that eliminates any question of the government's ability to continue these rules for such period as is necessary. In any case we believe that the authority to issue such regulations should reside at the Department of Transportation, rather than the FTC, for much the same reasons expressed earlier with respect to the policy responsibilities of the Department of Justice.

Statement of Delta Air Lines, Inc.

This statement on behalf of Delta Air Lines addresses three main subjects—which federal office should in the future deal with competitive and consumer practice regulation, the future disposition of Sections 412 (intercarrier agreements) and 414 (antitrust immunity) of the Federal Aviation Act, and reimposition of authority to regulate fares under Section 404(b).[1]

I. SUMMARY OF POSITION

In this statement, Delta urges the Subcommittee to consider a unique blend of measures which will ensure an adequate level of consumer and competitive practice regulation, minimize temptations and opportunities for future re-regulation of the air-line industry, and provide for federal preemption of economic, consumer, and competitive practice regulation. The major aspects of Delta's approach are summarized as follows:

"1. Airline competitive and consumer practice regulation should be lodged in the Federal Trade Commission. The Department of Transportation should not have any authority in this area.

"2. The CAB's consumer protection regulations and associated rulings in effect on December 31, 1984 in the areas of overbooking, baggage liability, no-smoking, incorporation by reference into the ticket of the conditions of carriage, charters, and computerized reservation systems should be affirmatively transferred to the FTC.

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[1] Because this statement is limited to issues relating directly to CAB sunset, this statement does not address the Employee Protection program, established by Section 43(d) of the Deregulation Act. This Section requires air carriers which were certificated prior to October 24, 1978 to grant a mandatory hiring preference to eligible employees of competing airlines who have been furloughed or terminated for any reason other than for cause, including reasons not remotely related to deregulation. Delta and the overwhelming majority of other air carriers believe that this regulatory program, which imposes on older airlines novel and extraordinary costs and regulatory burdens, has no place in a statute devoted to removing the heavy hand of regulation on carrier management. The U.S. District Court, District of Columbia, recently issued a ruling invalidating Section 43 because it contained an unconstitutional legislative veto provision. Delta strongly opposes any legislation to reinstate Section 43 as an amendment to CAB sunset or any other legislation.

"3. The FTC should be authorized to adopt and enforce rules for the smoking of tobacco aboard airplans.

"4. Federal preemption with respect to economic, consumer, and competitive regulation should be continued and strengthened.

"5. Careful consideration should be given to whether Sections 412 and 414 are needed for domestic air transportation, and, if it is determined that they are needed, which agency should administer the provisions.

"6. Congress should resist any effort to re-establish authority under Section 404(b)."

An explanation and amplification of the above approach are set forth in this statement.

II. FUTURE AIRLINE COMPETITIVE AND CONSUMER PRACTICE REGULATION

Delta's primary concern with possible sunset-related legislation is to avoid sowing the seeds of future airline re-regulation—not just re-regulation of such economic matters as fares and routes, but also any regulation by federal, state or local entities which is more intrusive than, or dissimilar to, the regulation to which other deregulated industries are subject.

Let it be clear that Delta is not arguing for a termination of federal airline consumer regulation. As will be explained, Delta thinks most such regulation is unnecessary because market forces, good business sense, and the concern which most airlines have for their customers would ensure more than adequate "consumer protection" for airline passengers and shippers. As a practical matter, however, Delta knows that, at least during the transition to full deregulation, the Federal Government will maintain its current role in the area of airline competitive and consumer practices. Even more importantly, we are also mindful that most air carrier operations cross state boundaries, and, therefore, that the traveling public benefits from, and the airlines require, a certain degree of unformity in competitive and consumer practice regulation that necessitates federal regulation and preemption, just as the industry and the public require uniform nationwide, federal air traffic control and safety regulations.

Delta's legislative objective is to see that future competitive and consumer practice regulation is authorized and located within the Federal Government in a way that permits governmental involvement in these areas, while also: (a) preventing an undue expansion of consumer practice regulation, (b) providing for a desirable amount of consumer protection uniformity by effectively preempting state and local regulation in that area, as well as with respect to economic regulation, and (c) foreclosing the possibility of significant re-regulation of any aspect of air transport operations. To these ends, Delta suggests that jurisdiction over competitive and consumer practices affirmatively be placed with the Federal Trade Commission, which would then regulate these matters for the airlines as it does for other industries, with existing CAB consumer regulations and associated rulings specifically to be transferred to that agency (and with suitable adjustments to be made in the FTC's organic statute).

Before outlining our specific proposals for implementing these suggestions, we would like to emphasize our industry's strong commitment to consumer satisfaction. Delta, for example, has always recognized that its interests are not only compatible with the highest regard for customers, but are vitally dependent upon consumer satisfaction and preference. Most carriers feel the same and act on that conviction. Even under the old economic regulation, when there was relatively little "consumer protection" initiative by the CAB or any other federal agency, various public opinion polls showed that the airlines consistently ranked at the very top among all industries in terms of consumer satisfaction, confidence, and value given for dollar paid (see, e.g., "The Study of American Opinion," U.S. News & World Report (1977); HEW Consumer News (1971); Aviation Daily, March 21, 1978, p. 118; and a Harris Survey used in The Continuing Public Mandate to Improve Inter-City Passenger Travel, Final Report, March, 1978). The airlines' affirmative concern, even then, was shown by the fact that Delta (and other carriers) developed procedures to provide non-smoking accommodations in advance of the CAB's adoption of regulations in this area.

These basic service-oriented characteristics of the airline industry have been underscored and intensified since deregulation by the demands of free market forces—of air travelers. We are a service industry, and every airline which intends to be successful has no choice but to offer the optimum price and service options for its passengers. Under deregulation, this translates into marketplace-required consumer protections, since repeat business is the sine qua non of success.

Delta's "Ready When You Are" motto is symbolic of the highest possible regard that Delta has for reach of its customers. We understand fully that other airlines will quickly claim our passengers and shippers if we are insensitive or unresponsive to their needs or desires. Other airlines view the competitive climate the same way—they have no choice under deregulation if they intend to remain competitive. While Delta is a leader in customer satisfaction, we are aware that other airlines are striving in every way possible to improve their services and overtake us. This competitive climate has produced a high level of respect for consumers and integrity in our industry. As a consequence, the airlines are being driven by competitive forces, not the government, to address and resolve all reasonable passenger or shipper grievances.

This means that the same "free market forces" that Congress decided in 1978 would best serve the interest of consumers in such vital areas as route freedom and pricing will also ensure that consumers are protected with respect to the handling of their baggage, booking practices, no-smoking accommodations, and the like.

Nevertheless, Delta recognizes that other "unregulated" businesses are subject to some federal oversight with reasonable respect to competitive and consumer practices, and we would expect the airlines to be accorded the same government attention now that they have joined the ranks of the "unregulated." In order to accomplish this, Delta suggests that airline competitive and consumer practices be regulated by a single office of the Federal Government, and that such regulation should be done by the FTC, as is the case with most other industries. Further, the Department of Transportation and all other agencies and departments of the Federal Government should not be authorized by Congress to deal with such matters. For example, if the FTC regulates the airlines, the DOT should not be allowed to establish a "consumer complaint" office as it now plans. Such fragmentation of governmental functions is unnecessary and undesirable.

There are a number of reasons why Delta prefers the FTC to the Department of Transportation in this area. First, the subject matter is a natural and logical one for the FTC, not the DOT. Most of the CAB regulations with which we are here concerned—those dealing with overlooking; liability for lost or damaged baggage; incorporation by reference into the ticket of an airline's conditions of carriage; consumer protection rules dealing with charter services, and the regulations which the CAB plans to adopt before sunset concerning computerized reservations systems—are grounded in major part on Section 411 of the Federal Aviation Act. (Smoking regulations present a special situation that will be addressed later.) The subject matter of Section 411 is essentially the same as that of Section 5 of the Federal Trade Commission Act. While the airlines are currently exempted from Section 5, that is only because of the present existence of Section 41 and of the CAB.[2]

Except for the airlines, and a few other special exceptions, Congress has for years designated the FTC as the primary federal regulator of competitive and consumer practices for U.S. business. Under this mandate, the FTC, an independent agency—an arm of the Congress—has developed extensive expertise in the area. The FTC is the focus of the Federal Government's involvement in consumer protection. Although the FTC Act originally was designed primarily to promote and protect competition, as long ago as 1938 the reach of that Act was broadened to empower the FTC to protect the interests of consumers without proof of injurious effects upon competition. The Supeme court has confirmed that the FTC has authority to deal with consumers as well as competitors.[3] In furtherance of its responsibilities, the FTC has established rules and guidelines in areas such as deceptive pricing, and mail order merchandise, cooling off periods for door-to-door sales, and substantiation of advertising claims. Needless to say, the FTC has established mechanisms with which to deal with consumer protection and competitive practices, and these established mechanisms and procedures could be efficiently and easily used to protect airline consumers and air transportation competition. Conversely, it must be realized that the Department of Transportation has no expertise and few mechanisms for dealing with consumer protection matters, and that the DOT would have to establish both if it were given authority in this area. The Department has stated that it does not desire to assume this new type of activity.

Logically, then, when the CAB sunsets at the end of 1984, the special exemption of the airlines from Section 5 of the FTC Act should be terminated and the airline industry should be subjected to FTC consumer and competitive practice regulation just like most other U.S. industries. In our view, no sound reason has been advanced for treating the airlines differently in this respect.

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[2] Because it was the desire of Congress in 1938 to repose comprehensive regulatory authority over many aspects of airline operation in a single agency—the new CAB—airlines were excluded from FTC Section 5 coverage and similar powers for the CAB were created in Section 411 of the Federal Aviation Act.

[3] See, e.g., *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

A second reason for giving this responsibility to the FTC is the fact that, if this subject is not placed with that agency and were instead to be assigned to DOT, there would be a splintering of federal jurisdiction and activity concerning what is really a single subject matter—competitive and consumer regulation of businesses which are not subject to comprehensive economic regulation. Such fragmentation would produce inefficiencies, inconsistent government policies, and duplication, if not multiplication, of governmental bureaucracies.

Third, Delta is concerned that if our industry is singled out from other unregulated businesses and DOT is given special jurisdiction over airline competitive and consumer practices, along with the other airline-related powers which may be transferred to the Department, the stage would be set for future re-regulation. As some members of this Subcommittee will recall, Delta has been a long and consistent opponent of re-regulation: that was our original concern in opposing deregulation (a concern that Congress would instead re-regulate); it has been our concern since 1978 in urging Congress to complete the major deregulation effort which it made in 1978 as fully and expeditiously as possible, by sunsetting the CAB and by otherwise avoiding the creeation of opportunities for re-regulation; it is our concern now.

If competitive and consumer practice responsibilities are given to the Department of Transportation along with the other powers being suggested for transfer to that Department, virtually everything done by the CAB today could be done by DOT. For example, if broad and vague statutory language such as that in Sections 404(a) and 411 of the Federal Aviation Act were to be preserved for DOT implementation along with its other inherited powers, much more regulation could be attempted by the Department in the future than is now actually performed by the CAB, especially because the CAB has been a fairly consistent proponent of sunset. DOT could do this under the guise of "consumer protection" or through other forms of regulation. In short, if DOT were given competitive and consumer practice authority in addition to essential air service, international air transportation and other airline-related responsibilities, the Congress would simply be creating a "mini-CAB" within DOT, would be doing nothing to complete the deregulation process and, to the contrary, would likely be interpreted as inviting future re-regulation.

Such a result could be expected because singling out the airline industry for competitive and consumer practice regulation by DOT would create a unique statutory mandate. These actions certainly could be interpreted by the Executive Branch as permission to subject the airline industry to different and more intensive regulation than that borne by other industries. The invitation to re-regulate in response to changing future political and special interest pressures would be real and dangerous, and likely would be accepted at some time in the future. We ask the Congress to avoid this possibility, and to chart a true path to a deregulated environment which is nonetheless consistent with adequate consumer protection, by assigning these responsibilities to the FTC.

Fourth, DOT has no expertise with respect to, or mechanisms for, regulating airline competitive and consumer practices. Moreover, it is evident from the Department's testimony and presentations that the Department has no desire to enter these regulatory areas with which it is unfamiliar. Delta accepts the fact that the Department will have jurisdiction over the temporary essential air service program, and over international route and rate/fare matters. That may be appropriate, but it is not necessary for the Department also to be vested with consumer and competitive practice responsibilities when an independent agency and an arm of the Congress—the FTC—with established expertise, is available for this purpose.

Finally, a transfer of consumer protection authority to FTC would preserve the independent rulemaking power traditionally vested by Congress with an independent agency. The periodic reauthorization of FTC authority affords the Legislative Branch greater control in the estblishment of consumer and competitive rules. Additionally, we believe the institutional arrangement at the Commission, with a five member board, assures a fairer and more responsive regulatory process.

Because it is not always easy to distinguish between "domestic" and "foreign" air transportation, Delta believes that the FTC should have the same degree of jurisdiction over foreign air transportation that it has over other foreign business activities. This would be consistent with the FTC's existing jurisdiction over various aspects of foreign commerce. Congress has carefully established the authority of the FTC to deal with unfair methods of competition involving commerce with foreign nations, and thus the FTC already has experience in this area. This experience would be valuable in dealing with foreign air transportation, and the defined powers of the FTC would eliminate any possibility that the FTC would impair relations with foreign governments or would issue rulings which would be in conflict with the authority of the Departments of Transportation and State over such air transportation.

In order to make clear the FTC's initial responsibilities and scope of the FTC's jurisdiction; to avoid any hiatus in the CAB's present scheme of consumer regulation; and to underscore federal preemption, Delta recommends:

(a) that the airlines' present exemption from Section 5 of the Federal Trade Commission Act specifically be repealed so that there is no question but that the FTC has jurisdiction over airline competitive and consumer practices, and (b) that the CAB's consumer regulations and related rulings in effect on December 31, 1984 (*i.e.*, no-smoking, baggage liability, denied boarding compensation, incorporation by reference of the conditions of carriage, consumer protection rules dealing with charter services, and the regulations concerning computerized reservations services that will likely be adopted by the CAB) be transferred on that date to the FTC, to be implemented thereafter by that agency.

III. REGULATION OF NO-SMOKING ACCOMMODATIONS DOES NOT REQUIRE TRANSFER OF SECTION 404(a)

We fully recognize that lifting the air carriers' exemption from Section 5 of the Federal Trade Commission Act, without more, would not vest the FTC with jurisdiction over the CAB's no-smoking regulations, which are grounded not on Section 411 of the Federal Aviation Act, but on the provision of Section 404(a) which requires the air carriers to provide "adequate service."

Provision for regulation of no-smoking accommodations can be made, however, without transferring the "adequate service" language of Section 404(a) of the FAA. Indeed, Delta urges that the "adequate service" language not be transferred to any other agency or department, but that it be allowed to expire upon CAB sunset. The language was an intimate part of the old economic regulation, and formed the basis, for example, for orders specifying the quantity and quality of service—matters now explicitly to be governed by free market forces—as well as orders dealing with no-smoking accommodations. A continuation of that language, and a transfer of it to another agency or department, would be an implied invitation to economic re-regulation in unknown areas.

Instead, Delta urges the Congress to handle this matter by amending the Federal Trade Commission Act as narrowly as possible to add jurisdiction over smoking on board commercial aircraft. Suggested language is attached to Appendix A.

IV. NEED FOR FEDERAL PREEMPTION

Delta believes it essential that there be clear and unequivocal federal preemption not only with respect to the economic aspects of airline operation, but also concerning airline competitive and consumer practice regulation. FTC regulation would provide a sound and rational basis for preemption in the latter area.

The airline industry has a legitimate need for federal preemption. Unlike most other industries, airline operations rapidly traverse state boundaries. Air transportation is provided over a national, inter-related network and in order for the network to function fully and adequately to serve all areas, it requires a certain degree of uniformity. This is true of competitive and consumer practice regulation, just as it is of rules for the air traffic control system and of safety matters. Both the public and the airlines would be unnecessarily confused and disadvantaged if the rules concerning baggage liability, overbooking, incorporation of conditions of contract, permissible and impermissible trade practices, and the like varied from locality to locality. Moreover, because federal preemption in this area would foreclose a multiplication of inconsistent consumer and competitive practice regulations, preemption would help create a climate favorable to increased competition and the functioning of free market forces. Finally, preemption would ensure that the type of air transportation services which the public has come to expect and rely upon would continue in the deregulated climate, and that long-standing consumer protections would remain intact. For these reasons, Delta asks Congress to preempt in these areas, as well as with respect to economic regulation.

The Air Transportation Association has proposed amendments to Sections 105 and 604 of the Federal Act which would strenghthen in all of these areas. Delta endorses those suggestions. But to leave no doubt about the matter, we believe that Congress should also transfer the existing CAB consumer regulations to FTC, as suggested above.

V. FEW AMENDMENTS ARE NEEDED TO THE FEDERAL AVIATION ACT

The Subcommittee will note that, except for strengthening the preemption provisions, this statement has suggested no other changes to the Federal Aviation or Airline Deregulation Acts. On the other hand, legislation in other areas, such as the FTC Act, is needed in order fully to complete the deregulation process. This approach, while involving simple and straightforward statutory changes, also would help contain any sunset-related amendments of the aviation statutes in a narrow focus, and, therefore, help avoid re-regulation.

VI. SECTIONS 412 AND 414 (INTERCARRIER AGREEMENTS AND ANTITRUST IMMUNITY)

While Delta understands the reasons for the Air Transport Association's suggestion that the aviation acts be amended to transfer Sections 412/414 to the Department of Transportation rather than the Department of Justice, there are more preferable options with respect to domestic air transportation. These other approaches involve less need to amend the aviation statutes than does the ATA suggestion, and thus less opportunity for reregulatory proposals.

One option would be to transfer jurisdiction under Sections 412/414 to DOT for international air transportation only, and terminate the sections altogether for domestic air transportation.

A second option would be to allow Sections 412/414 to transfer to the Department of Justice as now scheduled, and to permit DOJ and DOT to proceed with respect to international matters in accordance with the accommodation which they have already reached. This option would leave both sections in existence for domestic as well as foreign air transportation, but to be administered by the DOJ.

We suggest a consideration of these options because Delta sees little need for Section 412 or 414 domestically. There seem to be only three primary domestic areas in which the carriers may need or desire to function pursuant to intercarrier agreements filed under Section 412 and which might need antitrust immunity under Section 414: (a) the current travel agency/Area Settlement Plan programs; (b) the airlines scheduling committees, which are designed to allocate available navigable air space at high density airports; and (c) the Scheduled Air line Ticket Office (SATO) program whereby airlines jointly operate ticketing office at government and military locations. The airline scheduling committees currently are virtually worthless from a practical standpoint, and consequently, there may be no real need to retain Sections 412 and 414 domestically with respect to them. The SATO program could more assuredly continue to function if it had statutory antitrust immunity, although the program probably could operate on a modified basis even in the absence of such immunization.

The travel agency/Area Settlement Plan programs might need immunization from the antitrust laws if they are to continue without change. This could be handled by special antitrust legislation, however, such as the Export Trading Company Act of 1982 which was designed to increase the export of goods and services produced in the United States by providing alternative avenues of relief from the antitrust laws as they relate to export activities, and such as the legislation authored by Congress which exempted from the antitrust laws exclusive territorial licenses to manufacture, distribute, and sell certain soft drink products. Just as Congress determined that these two areas have unique attributes, a simple and justifiable determination could be made with respect to the existing travel agency system and the Area Settlement Plan. Moreover, special legislation concerning the travel agency industry already has been introduced into the Congress, with airline support.

VII. FARE DISCRIMINATION—SECTION 404(B) OF THE FEDERAL AVIATION ACT

Although authority for the Civil Aeronautics Board to prevent unjust and discriminatory fares was termiated on January 1, 1983, there have been several legislative proposals advanced to reinstate authority under Section 404(b) of the Federal Aviation Act to regulate airline pricing. Under one such proposal, a petition could be filed with the Secretary of the Department of Transportation by a community alleging fare discrimination; and, if a violation is deemed to have occurred, the Secretary would apply to the U.S. Attorney for prosecution. If a violation has not occurred and the Secretary fails to take action within a given period upon receipt of a petition, the petitioner may bring a private right-of-action in the U.S. District Court.

Despite assertions to the contrary, this proposal constitutes re-regulation of airline fares. Air carriers would not be free to establish prices without fear of action being brought with the Secretary of DOT or in the U.S. District Court. Airlines would be forced to defend their pricing policies between city pair markets and constantly justify their pricing and marketing decisions.

This proposal presents a number of practical problems which would ultimately disadvantage airlines, consumers, and smaller communities. Below are several examples:

"1. The proposal fails to define "discrimination" and does not establish any standards or methodology for determining which fares constitute discrimination. Presumably, DOT, the U.S. Attorney or a U.S. District Court would be required to establish the standards and methodology for making such a decision. This would require creation of a complex governmental bureaucracy to review, analyze and make determinations on fare levels. Carriers would also be required to file tariffs and other price information in order to give the government a basis upon which to determine the reasonableness of a fare.

"2. Air carriers would be reluctant to enter or retain service in markets where competitive service does not exist for fear that any fear established might be subject to charges of discrimination. Ultimately, service to medium and small communities would deteriorate, and governmental goals and programs to assure essential air service would be frustrated.

"3. The proposal fails to recognize the cost differentials associated with different markets such as short-haul versus long-haul markets, dense versus thin markets and pleasure-travel versus business-travel markets. In addition, the cost of operations and service from small cities may differ markedly from the relative cost associated with larger markets.

"4. It would be impossible to establish standards to determine "reasonableness" since airlines have different cost structures upon which fares are based. Further, any such proposal could not take into account changes in operating costs (i.e., fuel prices and labor costs) and general economic conditions which affect elasticity of demand."

VIII. CONCLUSION

Under the overall approach outlined in this statement, the only changes needed in the aviation statues would be in Sections 105 and 604 in order to strengthen federal preemption, an yet continued consumer and competitive protection would be assured by the FTC Act Amendments set forth in the Appendix to this statement. Opportunities for statutory re-regulation would thereby be avoided, and temptations for future re-regulation by agency or departmental action would be severely, and appropriately, curtailed.

APPENDIX A.—PROPOSED FEDERAL TRADE COMMISSION ACT AMENDMENTS

1. *Removal of air carrier exemption from Section 5 of FTC Act:* Section 5(a)(2) of the FTC Act would be amended by striking "air carriers and foreign air carriers subject to the Federal Aviation Act of 1958."

2. *Vesting the FTC with authority to requlate no-smoking accommodations aboard aircraft:* Section 6 of the FTC Act would be amended by adding the following new subparagraph (i):

"The Federal Trade Commission is empowered to adopt and enforce rules for the smoking of tobacco aboard commercial passenger aircraft."

3. *Transfer of certain consumer protection regulations to the FTC:* The following savings clause would be added to the FTC Act:

"(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, privileges, and grants:

(i) Which either have been issued, made, granted or allowed to become effective by the Civil Aeronautics Board under Section 411 of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1381) or which have been issued in 14 C.F.R., Part 250, 252, 254 [the proposed computerized reservations systems regulations, and certain portions of Part 207], and

(ii) Which are in effect at the time this Act takes effect,

shall continue in effect according to their terms and shall be adopted and enforced by the Federal Trade Commission until modified, terminated, repealed, superseded, set aside, or revoked in accordance with the law by the President, the Federal Trade Commission, any court of competent jurisdiction, or by operation of law.

"(b)(1) The provisions of this Act shall not affect any proceedings, including notices of proposed rulemaking, pending before the Civil Aeronautics Board on the effective date of the transfer under subsection (a), but such proceedings and applications, to the extent that they relate to matters transferred by this Act to the Federal Trade Commission, shall be continue Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the Federal Trade Commission, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Federal Trade Commission is authorized to promulgate regulations providing for the orderly transfer of proceedings continued under Section (b)(1)."

STATEMENT OF EDWARD J. DRISCOLL, PRESIDENT AND CHIEF EXECUTIVE, NATIONAL AIR CARRIER ASSOCIATION

The National Air Carrier Association, on behalf of its member airlines, fully supports the views expressed in House of Representatives Report 98-793, titled "Civil Aeronautics Board Sunset Act of 1984", and especially the views pertaining to consumer protection and unfair competitive practices.

I appeared before the subcommittee on Aviation of the Committee on Public Works and Transportation on March 14, 1984 and at that time recommended to the committee that consumer protection functions currently exercised by the Civil Aeronautics Board be transferred to the Department of Transportation rather than to the Federal Trade Commission. Our basic reason for this recommendation was that the Department of Transportation would be far better equipped to exercise these functions, since because of the complexities, expertise in the field of air transportation is essential.

We fully support all of the reasons set forth in the referenced report and trust that your Aviation Subcommittee and the Senate Commerce Committee will support and recommend the transfer of, not only the consumer protection functions, but also the antitrust functions, to the Department of Transportation rather than to the Federal Trade Commission and the Department of Justice.

STATEMENT OF DAVID B. NEUMEYER, ASSOCIATE DIRECTOR, COALITION ON SMOKING OR HEALTH

Madame Chairman and members of the Subcommittee, my name is David B. Neumeyer and I am submitting for the record of today's hearing the views of the Coalition on Smoking OR Health, the American Heart Association, the American Cancer Society, and the American Lung Association. The Coalition was founded on March 5, 1982 by the ACS, the AHA and the ALA to bring smoking prevention and education issues to the attention of legislators and other governmental officials. The Coalition also serves as a public policy project with the National Interagency Council on Smoking and Health, an organization backed by twenty-four additional public and private health, education and youth leadership organizations.

The Coalition on Smoking OR Health believes it is absolutely essential to maintain the authority of the federal government to issue rules governing smoking aboard commercial aircraft when the authority of the Civil Aeronautics Board to do so expires at the end of 1984.

We believe that the authority of the Federal Government to issue rules governing smoking abroad aircraft is in the public interest for the health, comfort and safety of both passengers and crew. Cigarette smoking is the single most preventable cause of death and disease in the United States. Each year over 340,000 Americans die from smoking-related diseases. More than 75% of both all lung cancer cases and all causes of chronic obstructive pulmonary disease (emphysema and chronic bronchitis) are caused by smoking. In addition, no risk factor is more important than smoking in causing heart disease. Thus, smoking prevention and education is an activity of unparalleled importance for the health of the American people.

The impact of cigarette smoking on the health of smokers and nonsmokers alike was dramatically emphasized recently by the release of the Surgeon General's 1984 report to Congress on smoking. In his preface to the report, Surgeon General C. Everett Koop stated: "Cigarette smoking is causally related to chronic obstructive lung disease, just as it is to cancer and coronary heart disease; severe emphysema would be rare were it not for cigarette smoking." The report's most publicized finding concerned passive smoking, the effect of cigarette smoke on nonsmokers: "The children of smoking parents have increased prevalence of reported respiratory symptoms, and have increased frequency of bronchitis and pneumonia early in life. The children of smoking parents appear to have measurable but small differences in tests of pulmonary function when compared with children of nonsmoking parents." The evidence which has accumulated on the dangers of involuntary smoking over the past several years demonstrates that more than sufficient evidence exists to justify and require carefully drafted, reasonable regulations designed to safeguard the health and comfort of nonsmokers aboard commercial aircraft.

Passengers and crew aboard commercial aircraft are placed in a position which makes them more vulnerable to, and least able to escape from, the harmful effects of passive smoking Except in elevators where smoking routinely is prohibited, there is no location in our society where individuals are placed in closer confinement with other individuals than aboard commercial aircraft. Given that the vase majority of Americans are nonsmokers, that travel by air has become a major means of transportation in the United States and that no public place is more confining than an airplane, the need for reuglations to protect nonsmokers is apparent.

Since the C.A.B. originally adopted rules government smoking aboard commercial aircraft, rules government smoking in public places to protect the nonsmoker and to reduce the risk of fire from cigarettes have gained widespread acceptance. The C.A.B.'s current smoking rules provide no more inconvenience to the smoker and no more protection to the nonsmoker than is already provided in a variety of settings, such as movie theaters, concert halls, many public buildings and health care facilities. The traveling pulbic has come to rely on and support the rules governing smoking aboard aircraft to protect them from being subjected to cigarette, pipe and cigar smoke and to provide them additional protection from the dangers of fire aboard aircraft.

For all these reasons, the Coalition believes that rules governing smoking aboard aircraft are essential and urges Congress to transfer the C.A.B.'s authority in this regard to another federal agency when the Civil Aeronautics Board is sunsetted at the end of 1984.

The authority of the C.A.B. is issued rules governing smoking aboard aircraft is based on Section 404 of the Federal Aviation Act. The Board regulates smoking aboard aircraft in fullfillment of its obligation to insure that airlines provide fair and adequate service to airline passengers. However, when Congress passed the Airline Deregulation Act of 1978, it made no provision for the transfer of the enforcement of Section 404 to another Federal agency. As the Secretary of Transportation testified before the House Subcommittee on Aviation on February 29, 1984, "(s) the ADA does not provide for the transfer of the Section 404 'safe and adequate' authority upon which domestic smoking regulations are based, this authority will expire at the end of 1984."

Secretary Dole and the Coalition differ on what should be done about this state of affairs. According to her February testimony, Secretary Dole does not believe the absence of Federal smoking regulations will be a problem, and believes that airlines will continue to maintain separate areas for smokers and nonsmokers. We are not as sanguine as Secretary Dole. At the spring C.A.B. hearings on its proposed smoking rules several airlines testifies in opposition to the proposed rules in a manner which suggested that they did not intend to assure nonsmokers a seat in a nonsmoking section when the C.A.B. expires. These carriers argued that the smoking rules were at odds with their first come, first served, no reservations and no assigned seats operations. Further, the designation of smoking and nonsmoking sections is not enough for the nonsmoking majority of airline passengers. It is important that the nonsmoking section be expanded if necessary to provide seats for all nonsmokers who present themselves within a reasonable length of time before the aircraft is scheduled for departure.

The airlines have the obligations of a common carrier to attempt to provide service to all persons wishing to travel. If smoking by some passengers precludes other persons from being able to travel at all, the rights of the nonsmoker should prevail. Smoking has never been construed to a person's right aboard aircraft. Smoking is a privilege which may be denied given the circumstances and other health and safety considerations.

For all these reasons, the Coalition on Smoking OR Health urges the Congress to adopt legislation tranferring the C.A.B.'s authority under Section 404 of the Federal Aviation Act to another Federal agency.

In closing, Madame Chairman, the Coalition would like to commend you for your strong concern for consumer protection.

Thank you for the opportunity to submit these comments.

STATEMENT OF GENE E. OVERBECK SR., VICE PRESIDENT-GOVERNMENT AFFAIRS, AMERICAN AIRLINES, INC.

American Airlines was an outspoken opponent of proposals that eventually became law with the enactment of the Airline Deregulation Act of 1978. American's opposition to that legislation was based upon its belief that an integrated air transportation system functions most efficiently under public utility type regulation, with individual airlines operating pursuant to route franchises and with regulated prices.

That belief is now academic with respect to domestic air transportation. Route franchises have been eliminated and free pricing has been the rule for several years. A return to public utility type regulation of the airlines is no longer a practical option.

In this final year in the life of the Civil Aeronautics Board, Congress must decide whether to complete the process of deregulation by allowing the provisions of the 1978 law to take effect as scheduled or whether to resurrect selected pieces of the old regulatory pattern. In American's view, the process of deregulation is well beyond the point of no return and should therefore be completed in one decisive and final stroke. An airline industry that is partially deregulated and partially reregulated would be the worst of all worlds.

This statement will limit itself to a brief discussion of the proper disposition of the CAB's powers with respect to unfair trade practices, consumer protection, antitrust immunity for industry agreements and price discrimination. In other respects, American Airlines subscribes to the statement of the Air Transport Association.

In general, American urges the Committee to apply a two-step test to determine which of these CAB powers should be retained and which agency should assume them. The first step is to decide whether marketplace, if allowed to function freely, will adequately protect the public interest. If the marketplace will do the job, the CAB's powers should be allowed to lapse rather than be transferred to some other agency. The second test is to decide whether regulations applicable to business in general will work when applied to airlines. If so, then regulations specifically designed for airlines should be avoided in favor of treating airlines like all other businesses.

UNFAIR TRADE PRACTICES

Section 411 of the Federal Aviation Act, which gives the CAB powers to deal with unfair trade practices, was not specifically transferred to any other federal agency by the Airline Deregulation Act, nor was the language in the Federal Trade Commission Act exempting airlines from the jurisdiction of the FTC modified. By definition, this is a matter that cannot be left entirely to the marketplace. Thus the question is whether prohibitions against unfair trade practices applicable to business in general will suffice for the airline industry. If so, then elimination of the airline exemption from the Federal Trade Commission Act is clearly the preferred course. Only if the FTC's jurisdiction is perceived as not suitable for the airline industry should Congress create and appropriate funds for a separate regulatory program within the Department of Transportation.

American is unaware of any contentions that the FTC has insufficient expertise to monitor competition in the airline industry or that the language of the statute it administers is deficient when applied to airlines. Indeed, the language of Section 411 was modeled after Section 5 of the Federal Trade Commission Act.

Those who would create a new regulatory scheme in DOT justify their position first by citing the dangers of state regulation. This concern, although a real one, is best answered by strengthening the federal preemption language in Section 105 of the Airline Deregulation Act, not by creating new layers or regulation. Another questionable argument is that airlines should not be subject to FTC jurisdiction for competitive practices in domestic air transportation while they are subject to DOT jurisdiction for those same practices in international transportation. It is less than clear how a split in jurisdiction would create real world problems. After all, domestic air transportation has been deregulated while international air transportation has not. In any case, if a split must be avoided, it is better to give full jurisdiction to the FTC rathern than to the DOT.

Indeed, until the dispute over computerized reservation systems arose in 1983, it was the unanimous industry position that FTC rather than DOT should assume jurisdiction over airline competitive practices upon CAB sunset. This dispute has led many airlines to conclude that they want more regulation rather than less when it comes to monitoring airlines competitive practices, and that DOT is more likely to play an activist role than the FTC. This is nothing more than a call for partial deregulation of the airline industry, a step that Congress should staunchly resist.

Whatever one's view may be of the issues relating to computerized reservations systems, the fact of the matter is that the CAB, before year-end, will have in place a detailed rule applicable to this respect of the airline distribution system. If jurisdiction over competitive practices is given to the FTC on January 1, 1985, the CAB's rule on computerized reservations systems should continue in place unless and until the FTC sees fit to change it.

CONSUMER PROTECTION

The CAB's various consumer protection measures have not been based entirely on Section 411 of the Federal Aviation Act. Section 404(a) of the Federal Aviation Act gives the CAB jurisdiction to ensure that airlines provide safe and adequate service. Safety in air transportation is, of course, the primary responsibility of the Federal Aviation Administration, and the CAB quite properly has not involved itself in this area except for fitness determinations, which could just as well be made by the FAA prior to issuance of an air carrier operating certificate.

Adequacy of service is a concept that has its origins in the route franchise bestowed by a certificate of public convenience and necessity. If one has a route franchise which precludes others from serving the route, then one must provide service (i.e. flights) adequate to meet the public's demand for air transportation over that route. Of course, this point is no longer valid since no airline enjoys a domestic route franchise today.

The CAB's use of the "safe and adequate" service language as a foundation for a number of consumer protection rules, while a stretch of the statutory purpose, was nonetheless understandable in light of the airline exemption from jurisdiction of the Federal Trade Commission. Now that certificates of public convenience and necessity no longer represent route franchise, it is time to eliminate the airline exemption from the Federal Trade Commission Act and to repeal Section 404(a) of the Federal Aviation Act, allowing the FAA to assume responsibility for all aspects of safety, including carrier fitness.

Much of the CAB's consumer protection program can now be adequately handled by marketplace forces. To the extent that the marketplace proves inadequate, the FTC can be expected to step in. If for some reason FTC jurisdiction proves deficient, Congress can always revisit this issue when the extent of the deficiencies are known. It is premature at this point for Congress to allow itself to be talked into building up a DOT bureaucracy for the purpose of protecting consumers from airlines, or airlines from airlines. The marketplace, augmented by the FTC's powers over business in general, should be given a chance to function.

ANTI-TRUST IMMUNITY FOR INDUSTRY AGREEMENTS

The industry position of Sections 412 and 414 of the Federal Aviation Act (which permit industry agreements in certain circumstances to be given immunity from the anti-trust laws) has long been to transfer these functions to the DOT upon CAB sunset rather than to the DOJ. Since these provisions involve airline programs, and are not applicable to business in general, it seemed appropriate that an airline-oriented agency administer them.

Recent events, however, have led American to question whether Sections 412 and 414 should be retained at all. Other service industries are able to survive and prosper without them; why can't the airlines? Until recently, the airline answer was that Sections 412 and 414 couldn't hurt anything and might prove useful in preserving things such as the post-PATCO scheduling committees and the exclusivity feature of the travel agency program. It is now apparent that scheduling committees are anachronisms and need not survive CAB sunset. So long as there are scheduling committees, the FAA will be tempted to perpetrate some form of "slot controls" at the nation's busy airports rather than augment the capacity of the airways system to accommodate the traffic peaks that result when airlines schedule their flights to meet the demands of the public.

The status of the travel agency program will be resolved when Congress decides whether or not to enact specific legislation relating to the CAB's decision in the Competitive Marketing Investigation.

As a result, it is time for Congress to rethink whether Sections 412 and 414 should be retained at all beyond January 1, 1985. If they are to be retained, they should be subject to a sunset date and should be administered by an agency that is both unrelated to the Federal Aviation Administration and expert in anti-trust concepts. American's view is that on balance it is preferable for Sections 412 and 414 to be repealed without further ado. If they are to be retained for a limited duration, they can best be administered by the Department of Justice. DOT's jurisdiction over economic aspects of air transportation should be minimized, not augmented.

FARE DISCRIMINATION

The Committee has recently heard suggestions that Section 404(b) of the Federal Aviation Act, which ceased to be law on January 1, 1983, be revived in whole or in part to ensure that airline fares not be significantly different on "comparable" routes. The thrust of these suggestions is that when competition drives down fares on certain high density routes, fares to places such as Bismarck, North Dakota, ought to be correspondingly reduced. The flaw in this argument is the mistaken assumption that there is some objective rule of comparability that can be applied. The fact of the matter is that airline costs vary greatly with the length of haul and density of a given route.

Only the marketplace can truly be relied upon to determine long-term differentials in fares on routes with differing cost and traffic characteristics. To the extent that fares become unduly depressed on certain high density routes, marketplace economics will eventually cause them to be increased. Similarly if fares on certain low density routes become unreasonably high, the profit opportunities will eventually encourage entry by one or more new airlines. Congress decided in 1978 that the marketplace can better regulate fares than the Civil Aeronautics Board. It is simply too late for Congress now to reverse itself on this principle.

STATEMENT OF GORDON H. MANSFIELD, NATIONAL ADVOCACY DIRECTOR, PARALYZED VETERANS OF AMERICA

Mr. Chairman, and Members of the Subcommittee, it is a pleasure for the Paralyzed Veterans of America to present the views and concerns of its members regarding the Civil Aeronautics Board sunset.

PVA is a congressionally chartered veterans' service organization with over 11,000 members, all of whom have served in the United States Armed Forces and have incurred spinal cord injury or dysfunction, both service-connected and non-service-connected in origin. All of PVA's members are handicapped within the meaning of Section 504 of the Rehabilitation Act of 1973, as amended

PVA has historically addressed the issues of accessibility and maximum independence for our members and all disabled citizens. We are particularly pleased that this hearing is being conducted—transportation is one of the paramount aspects of an accessible, integrated society. Because of this fact, PVA has, for many years, been actively involved in addressing the transportation needs of America's disabled citizens.

It has been the experience of PVA that this nation has been slow in responding to the accessibility requirements of the nation's disabled citizens. This has been true in the removal of barriers, both architectural and attitudinal. During the past decade, however, there has been an increasing awareness of these needs. This awareness has, unfortunately, been spordic and piecemeal, with attention being frequently directed at isolated or local problems and situations.

In our efforts to ensure that adequate and equitable travel resources are available to disabled individuals, PVA has worked with a wide range of organizations and agencies, both private and governmental. In all these actions, PVA has consistently stressed the need for a comprehensive, integrated approach in addressing the needs of the disabled traveler. Travel, particularly inter-city travel, if inaccessible, can pose a serious hinderance to the disabled traveler, if it does not preclude travel altogether.

During the past year PVA has attended conferences conducted by the Department of Commerce, Division of Tourism; has met with the Air Transport Association; and has continued as an active participant in the Access to the Skies program conducted by Rehabilitation International U.S.A. In all these instances, specific aspects of travel for disabled individuals have been addressed, and several conclusions have become evident.

The first factor which is most evident for any disabled traveler is the lack of continuity in available services. The disabled traveler is continually faced with unexpected obstacles. Examples of such obstacles are so numerous as to be the norm. A few specific incidents will illuminate this situation.

A disabled traveler going from Washington, D.C., to New York City decides to utilize the AMTRAK system. The train is boarded at Union Station in Washington and is most accessible, since AMTRAK has taken very positive actions in equipping their rail fleet to meet the requirements of disabled travelers. The trip is uneventful, because AMTRAK has provided special cars with wide aisles, accessible restroom facilities, seating which provides for ease of ingress and egress of the disabled passenger, and has personnel which have an understanding of the needs of the disabled traveler.

Upon arrival at Pennsylvania Station in New York, the traveler leaves the train only to find that he is below street level with no suitable facilities for reaching the street. The traveler has two options; first there is an escalator which is totally unsafe, at best, or impossible to use. The second option is to find a station attendant who has a key to the one elevator which is used primarily for the removal of garbage and trash, and thereby reach the street level. Unfortunately, problems similar to this specific example occur every day throughout the country.

A second example of the lack of continuity or uniformity regards air travel. The disabled traveler has, generally, learned from experience that it is prudent to contact the air carrier prior to departure and notify them that the traveler has a disabling condition. This is due, in part, to the diversity of requirements and procedures established by individual air carriers. The disabled traveler, upon arrival at the airport, finds that despite his previous contact with the carrier, the procedures are interpreted differently by the personnel working at the time. The traveler then must undergo changes in plans, acrimonious discussions, or accept demeaning treatment. This situation can be exacerbated when differing interpretations are made from airport to airport by the same carrier, or even person to person within the same airport.

PVA is greatly concerned that with the sunsetting of CAB regulations, what little enforcement authority that now exists will completely disappear. The potential situation is analogous to that which recently occurred regarding telecommunications. In the haste of deciding divestiture requirements on the Bell Telephone System, the judicial system overlooked the provision of service to handicapped consumers. Also, Congress, despite passage of the Telecommunications for the Disabled Act, was unable to foresee the regulatory wasteland where no effective remedy is available. The Federal Communications Commission has been tasked with creating regulations which would obligate the American Telephone and Telegraph Company, and the operating companies, to provide services which they have been unable to fulfill. This impasse exists because the needs of the disabled were not considered prior to divestiture.

PVA believes this Subcommittee has the opportunity to examine the situation as regards airline travel by handicapped individuals, and to provide legislation for specified enforcement by a designated agency which has the proper authority and capability. We are specifically concerned that enforcement of appropriate regulations be placed within one designated agency. The uncertainty of what parts of CAB Section 404 would be placed in which agency upon sunsetting of the CAB is of paramount concern.

PVA believes the Congress should examine the alternatives available for sure and knowledgeable enforcement of regulations providing for equal access to air travel by handicapped individuals. PVA would support congressional direction to designate the Architectural and Transportation Barriers Compliance Board (A&TBCB) as the federal agency responsible for enforcing existing Civil Aeronautics Board Section 404 consumer protection regulations. The A&TBCB has a structure, and knowledgeable personnel, to deal with issues of concern to handicapped individuals. The A&TBCB has been dealing with structural barriers to the full integration of handicapped persons for some time. PVA believes that the A&TBCB, with appropriate congresssional authority, and adequate staffing and funding would have the capability of dealing with the valid complaints of handicapped airline travelers.

PVA urges this Subcommittee to make a determination of the need, and to ensure that a specific agency is designated to enforce equal access to air travel for handicapped individuals. This agency should have clear responsibility and sufficient authority to carry out a well-defined mission.

In addition to transportion problems, there is a second factor which confronts any disabled traveler: upon arrival at his destination, the disabled traveler faces limited available accommodations, dining opportunities, and recreational facilities. While these are part of the larger problem of architectural barriers in society, they pose a special limitation for options available to the disabled traveler. PVA recognizes that the government cannot mandate accessibility in the private sector; however, we believe that it should be encouraged.

The establishment of uniformity in travel procedures, and the removal of physical barriers, will greatly enhance the ease of movement for all disabled individuals. Of particular importance are the implications of such actions for the disabled business traveler. The disabled business traveler frequently lacks the time needed for planning his trip far in advance.

As more and more disabled individuals enter the work force in jobs of responsiblity and independence, the requirements for uniformly accessible transportation and facilities increase. The very livelihood of the disabled worker may depend on adequate transportation. Like any other business person, the disabled business traveler must have access to a readily usable network of transportation services. It is PVA's firm conviction that the needs of the disabled business traveler, as well as the disabled tourist, must be met if this nation is to be truly accessible.

One area that we desire to address in this statement is the adequacy of existing federal laws and policies. In this regard, PVA would like to comment on one specific action which is needed to provide improved accessibility in the private sector. Until December 31, 1982, there existed in the Internal Revenue Code of 1954 a provision (Section 190) which provided a tax deduction for the removal of architectural barriers in privately-owned, publicly-used places of commerce, employment, and recreation. As noted this provision was allowed to expire over a year ago.

There are presently pending several legislative proposals which would reinstate Section 190, but none has received enthusiastic treatment by the revenue committees. Except for a few provisions addressing the needs of the blind, Section 190 was the only statement in the Tax Code which directly benefitted the handicapped. PVA finds it difficult to understand why Congress has allowed this provisions to remain inactive for nearly a year and a half.

PVA realizes that this Subcommittee is addressing the needs of disabled travelers, and it is the Senate Committee on Finance which addresses changes in the Tax Code. However, the needs of disabled individuals who travel would be greatly served if the private sector had inducements for making facilities accessible. In this regard, we request that Members of this Subcommittee encourage and support efforts by their colleagues in securing reinstatement of Section 190. Such action will benefit disabled travelers and millions of other Americans, by providing incentives for the creation of a barrier free society.

The establishment of uniformity in travel procedures and the removal of physical barriers will greatly enhance the ease of movement for all disabled individuals: of particular importance are the implications of such actions for the disabled business traveler. For the occasional disabled tourist, travel entails considerable time being used to ensure the availability of accessible facilities and plans—the disabled business traveler generally lacks the luxury of extra time to plan this far in advance.

Mr. Chairman, on behalf of the members of Paralyzed Veterans of America and all disabled citizens we welcome this opportunity to comment. It is essential that the problems of the disabled traveler be addressed and hearings such as this greatly assist in focusing attention on this multifaceted issue. Hopefully, this will be the beginning of efforts to create a uniform, comprehensive approach to the needs of disabled individuals.

Again, thank you, and this concludes my statement.

STATEMENT BY LOREN DEGROOT, DIRECTOR, AVIONIC SYSTEMS, COLLINS GOVERNMENT AVIONICS DIVISION, ROCKWELL INTERNATIONAL

Thank you for the opportunity to share some thoughts on what I consider to be a significant national resource—the NAVSTAR Global Positioning System.

By now, most of the world community that is concerned with safe and efficient navigation—whether for aircraft, ships, land vehicles or spacecraft—is familiar with and excited about this new space-based development. Suffice it to say, therefore, that when NAVSTAR is fully operational in 1988, the 18 NAVSTAR satellites will provide worldwide, all-weather, day/night navigational data that will permit the establishment of a vehicle's position within 16 meters and its velocity within 1/10 of a meter per second

The first transatlantic flight using satellite navigation occurred last June when a Rockwell International corporate aircraft flew from Cedar Rapids, Iowa, to Paris, France. During this 1983 flight, satellite availability was limited to several hours per day over the specified flight path. Yet even with this limitation, the aircraft was able to navigate the entire distance using GPS signals exclusively and then park at a predesignated spot on the apron at LeBourget International Airport with an accuracy of twenty-five feet.

Rockwell International has been awarded the production contract for the NAVSTAR satellites and one of the full scale development contracts for NAVSTAR User Equipment. According to the current, funded satellite deployment plan, in approximately four short years GPS will be fully operational and worldwide navigation will be possible for 24 hours per day. Prior to that time, an ever increasing signal coverage will open new opportunities for civil aviation as well as many other commercial users to receive the benefits of this most accurate and available of navigation systems.

I believe that the most challenging navigation issue facing the civil aviation community today relates to establishing a bold plan for introducing NAVSTAR into operational usage. Introduction of NAVSTAR into civil aviation operations can be accomplished by one of two methods: Wait until the system has been perfected to the point that it can be certified as the "sole means" of navigation; or, establish an evolutionary plan whereby the incremental capabilities of the system can be realized as they become available.

While the first method is the more conservative, and therefore, the preference of regulatory agencies, it suffers from the extended time required to take advantage of the capabilities that are now available from the system. I would encourage the Congress to consider the advantages of an evolutionary plan that would permit GPS to be introudced to the civil aviation community on a gradual, confidence building schedule.

I believe we can begin to experience some of the potential life saving benefits of GPS well before the total system is declared to be "fully operational". Long before GPS can be certified as the "sole means" of navigation, it can be employed to dramatically improve the safety of airborne navigation through its use as an Independent Position Monitor. Coupled with automatic, reliable long-range communications with Air Traffic Control centers, a GPS based Independent Position Monitor could provide a much needed long-range surveillance capability.

In previous testimony before the Subcommittee on Transportation, Aviation and Materials of the House Committee on Science and Technology, it was suggested that possible causes of Korean Airlines Flight 007 straying off course on that fateful day included the possibility of the flight crew entering incorrect data, the possibility of faulty cross-checking of navigational data and the lack of radar coverage during certain portions of the flight.

The need for an Independent Position Monitor was also evident during the near-miss by two jumbo jets near Miami, Florida, in the fall of 1983. An Independent Position Monitor could have been used to provide an independent cross-check of both altitude and position to avoid this type of situation. Today's on-board navigation systems would not be useful in comparing altitude information since these equipments provide only latitude and longitude position data.

Today, flight crews are totally dependent on human activity for data insertion and cross-checking of onboard navigation systems during long over-water flights or flights in remote areas where ground-based navigation aids and radar are not present. GPS is the only airborne navigation system that is available which can establish an unambiguous aircraft independent of initialization and without human intervention. Unlike many existing navigation systems such as inertial, GPS does not have to be "initialized" before it produces information. It simply must have the power switch turned on.

An Independent Position Monitor for international and domestic air carriers could use readily available GPS signals to provide accurate cross-check data for latitude, longitude and altitude within 100 meters. This accuracy could be provided without any action by the operator other than turning on the power. Compare the GPS three-dimensional accuracy of 100 meters with a maximum two-dimensional inertial navigation system error of 2 nautical miles-per-hour and Omega system errors in the range of several nautical miles.

Our studies show that a GPS based Independent Position Monitor could be commercially available for approximaely $10,000 in 1988 when the NAVSTAR system is scheduled to provide worldwide coverage. It seems a small cost to pay for a system that would eliminate the possiblility of human input errors and improve or possibly automate the cross-checking of navigation data on board United States and world air carrier aircraft.

Pilots currently cross-check position data manually. The use of a GPS based Independent Position Monitor would materially enhance flight safety in long over-water routes and in remote areas by augmenting flight following services where ground-based navigation aids and radar are unavailable. With increasing air travel to remote destinations, the importance of accurate navigation continues to increase. Tolerances of 5 to 10 miles may be acceptable today, but could lead to future overflights of unfriendly territory. As noted in earlier House testimony, North Pacific Route R-20, which was the intended route of Korean Airlines Flight 007, is only 52 nautical miles from Soviet airspace at one point. There are numerous other routes around the world where air carriers operate much closer to unfriendly borders.

A GPS based Independent Position Monitor, used in conjunction with automatic, reliable long-range communications, would be an effective way to employ today's technology to improve air safety and eliminate the absolute dependence that cockpit crews have on navigation systems which are subject to human error.

While NAVSTAR GPS could be used today to provide a sorely needed Independent Position Monitor capability, it is necessary that perceived limitations which preclude its adoption as a "sole means" of navigation be resolved without delay. Limitations which have been identified by various organizations include questions relative to coverage, availability, integrity, accuracy and cost. Solutions to each of these limitations have been identified, and an accelerated demonstration program should be implemented to prove their adequacy to meet operational needs. Permit me to briefly discuss each of these preceived limitations.

First, is the question of coverage. When the NAVSTAR system was being considered for military applications only, budget limitations forced reduction of the operational satellites. The reduced constellation has created moving geographic areas where the number of satellites available to provide a reliable position fix is inadequate for the needs of a civil aviation community. It is our view that the originally planned 24-satellites would remove this limitation in the presently planned and funded constellation.

The question of availability relates to the fact that the NAVSTAR system was designed for military use and is to be operated by the Department of Defense. Some organizations are concerned that the system could be shut down by the DoD in times of national emergency or worldwide conflict. Most navigation systems in use today have had their genesis in the same manner that GPS has. Even our present-day DME system is a derivative of the TACAN system that was developed to meet military needs. Loran and Omega are two additional examples that also come to mind. With the President's recent offering of GPS to the world's airlines, it would appear that the concern of availability should diminish. Once an electronic navigation system has been publicly committed to civilian users, I cannot think of a single incident during which that system has been denied to civil aviation operators.

The issues of integrity is a highly technical one that involves the process of ascertaining that the NAVSTAR system is operating as expected. Several technical solutions that address this issue are a fundamental part of the NAVSTAR system. These solutions, which include both satellite and user equipment monitoring schemes, require addition testing to ensure that they meet the certification requirements of the regulatory agencies.

The question of system accuracy can perhaps be better stated as the ability to have confidence in the position determination of the system. NAVSTAR, in its relatively short life, has had more extensive testing and has accumulated more data on its accuracy performance than any other navigation system has had during its developmental cycle. Additionally, our transatlantic flight demonstrated the worldwide accuracy of GPS during our four day flight to Paris. Consistently, we were within less than 50 meters of our actual position. Captain Charles Hall, pilot of that first transatlantic flight, summed up his confidence in the NAVSTAR system when he said, "Knowing that the system is that accurate makes you feel real comfortable up there—to be able to say with assurance, yes, we are right where we say we are."

Finally, there is the question of cost. I do not believe that this question relates to the cost of the user equipment. We know that although the system employs new technology signal processing schemes, the recurring cost for a civil aviation set is very attractive—approximately $10,000. Rather, the question of NAVSTAR GPS cost relates to the issue of user charges.

The potential for a "special user tax" is serving as a severe deterrent to acceptance of NAVSTAR GPS in the civilian marketplace. Difficult questions as to how the user fee would be administered go unanswered, creating a great deal of confusion. There are no plans to appropriate the funding necessary to establish the administrative organization required to implement the proposed policy. Furthermore, it is debatable as to whether the user fee would ever result in recoupment of GPS development, acquisition and operating costs. Rather, it is probable that the administrative costs, technical support and equipment modification costs would exceed the income provided by an affordable user fee.

Questions relative to product safety and product liability are almost impossible to anticipate if a user charge with its consequential operational impacts is imposed upon civil aviation operators. The concept of a police officer stopping an automobile and having a car towed away for failure to purchase an automobile license (a "special user tax") is easy to visualize. This simplistic analogy, however, does not apply when one considers civil aviation operations. Who is liable in the event of an air tragedy that is related to the Government's denial of GPS to an operator who has inadvertently failed to pay his special user tax?

As you can see, the problems involved in assessing a user tax for the civilian use of GPS are significant. Coupled with the fact that there is no precedent for such a user tax policy, I would urge you to reconsider earlier Congressional guidance on this matter and direct the Department of Defense to rescind its current policy regarding the imposition of a GPS user fee. Furthermore, I would urge that the Department of Defense be directed to not impose a user fee at some future time.

In conclusion, I would like to voice my support for Senate Concurrent Resolution 69 relating to the use of satellite navigation aids. I would recommend that the Congress speed up the timetable of NAVSTAR to permit its early use by the civil aviation community as an Independent Position Monitor. I would also encourage you to direct the FAA to expedite its development and testing of technical solutions to the currently perceived limitations so that NAVSTAR GPS can be certified as a "sole means" of navigation before the end of this decade.

And finally, I would urge you to eliminate from consideration the imposition of user fees for the domestic and foreign use of GPS in view of the benefits of this system to public safety. I believe that the NAVSTAR GPS navigation system is a national resource that cannot be hampered by the imposition of a user fee. The benefits that GPS can provide to the nation and to the world dictate that this system be available in the near term to all who would use it.

BRITISH AIRWAYS,
New York, NY, June 19, 1984.

Hon. NANCY LANDON KASSEBAUM,
Chairman, Subcommittee on Aviation, Committee on Commerce, Science, and Transportation, Washington, DC.

DEAR MADAM CHAIRMAN: I am writing to you to express British Airways' concern about an amendment that we understand you are considering introducing to the Senate version of the Civil Aeronautics Board Sunset Act of 1984, H.R. 5297, to require the U.S. Postal Service to use U.S. carriers to transport the U.S. mail whenever possible. This issue was also raised in the report of the House Public Works and Transportation Committee on the CAB sunset legislation, which suggests (erroneously we believe) that current law requires the Postal Service to award international mail contracts to U.S. carriers even when they are underbid by foreign carriers.

We are surprised and disappointed that there would be protective legislative proposals afoot that fly in the face of existing Congressional pro-competitive international aviation and postal policies. Such legislation would be most harmful to countries like the United Kingdom which have followed aviation and postal policies similar to or even more liberal than the United States.

For example, the specific awards critized by the House committee report concern the Postal Service's recent award of several contracts to foreign carriers, among them British Airways, under the International Surface Air Lift ("ISAL") mail program, involving the carriage of bulk printed matter from the United States to foreign countries. The British Post Office administers its version of ISAL mail, the Accelerated Surface Post ("ASP") mail, on a fair and nondiscriminatory basis. In the latest round of contract awards the entire ASP lift between the United Kingdom and the United States, including routes to Boston, Chicago, Los Angeles, Miami, New York and Washington, was awarded to Pan Am and TWA, who were the low bidders.[1] Furthermore, there is no United Kingdom law requiring the British Post Office to prefer British carriers in transporting any U.K. mail and it transports other types of U.K. mail on U.S. carriers on a non-preferential basis.[2]

In contrast, the Postal Service ISAL awards were made to foreign carriers under a discriminatory bidding process requiring them to underbid U.S. carriers by at least 10 percent to be awarded a contract. Less than twenty percent of the total ISAL mail volume was awarded to foreign carriers. The rest will continue to be carried on U.S. carriers.

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[1] British Airways, British Caledonian, Northwest Airlines, Air France and Flying Tiger also submitted bids in response to solicitations by the British Post Office.

[2] For example, because of scheduling considerations, the British equivalent of Express Mail, Data Post, is transported to Miami by Pan Am and to Chicago by TWA, even though British Airways operates direct service to both of these cities.

All that British Airways seeks in this country is reciprocity. British Airways is already severely disadvantaged in its efforts to obtain a modest portion of the U.S. mail travelling between the United States and the United Kingdom by current administrative U.S. Postal Service practices. Those practices are at odds with Congressional postal and aviation policy directives, which, if adhered to, would require the Postal Service to open its procurement of international transportation for the mail to more, not less, competition. Legislation requiring U.S. Postal Service policies to become even more restrictive would be pure protectionism, unjustified by any existing Congressional postal or aviation policy, and, if adopted, would inevitably lead to similar moves by foreign governments.

CURRENT CONGRESSIONAL AVIATION AND POSTAL POLICIES

In the International Air Transportation Competition Act of 1979 and elsewhere, Congress has established an international aviation policy placing maximum reliance on competition. The policies currently established by Congress for the Postal Service require that the "highest consideration" be given to the prompt and economical transportation of mail. It would be completely inconsistent with either of these policies to require U.S. mail to be transported on U.S. carriers even when they are underbid by foreign carriers.

A statutory directive that the Postal Service be required to subsidize U.S. carriers through a U.S.-flag preference would represent a startling and inexplicable departure from Congress' pro-competitive international aviation policies. Those policies are laid out, among other places, in section 102(a)(3) of the Federal Aviation Act, in which Congress has directed the CAB, in performing its duties in relation to international transportation, to consider as being in the public interest "the availability of a variety of adequate, economic, efficient, and low-price services by air carriers and foreign air carriers without unjust discriminations, undue preferences or advantages. . . ." In section 102(a)(4), Congress has directed the CAB to place "maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and attract capital. . . ." And in section 1102(b)(2) of the Federal Aviation Act Congress has established, as an explicit goal of U.S. international aviation policy, "Freedom of air carriers and foreign air carriers to offer fares and rates which correspond demand. . . ."

A specific legislative requirement directing the Postal Service to subsidize U.S. carriers by transporting mail on them even where they have been underbid by foreign carriers would make a mockery of these policies. Such a naked departure from the pro-competitive international aviation policies that the United States has aggressively pursued with other countries around the world would be particularly difficult to justify on any basis in the case of a foreign postal administration, such as the British Post Office, which employs more liberal competitive policies than the U.S. Postal Service.

If Congress is really prepared to go down the road of directing the Postal Service to subsidize U.S. carriers, it should at least require that Postal Service policies with respect to the flag carriers of a particular country be no more restrictive than the practices of the postal administration of that country toward U.S. airlines.[3]

Legislation requiring a discriminatory rate preference favoring U.S. carriers would be an equally stark departure from current Congressional postal policies. Section 5001 of Title 39, United States Code requires that the Postal Service "shall provide for the transportation of mail in accordance with the policies established under section 101(e) and (f) of this title. . . ." Section 101(e) directs that the "highest consideration" be given to the requirement for the most expeditious transportation of important letter mail. And section 101(f) requires that the "highest consideration" be given to the "prompt and economical delivery of *all* mail" and that a *fair and equitable* distribution of mail business to carriers providing similar modes of transportation services to the Postal Service" be made (emphasis added).

Congress' goal, when it enacted these provisions in the Postal Reorganization Act in 1970, was to provide "efficient and economical postal service" to the American public. H. Rep. No. 1104, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3649, 3650. There is no evidence at all in the Postal Reorganization Act that Congress intended to depart from its paramount goal of providing for "efficient and economical" postal service to the American public by requiring a discriminatory rate preference for U.S.-flag air carriers. As noted above, section 101(f) of Title 39 requires a "fair and equitable distribution of mail services to carriers providing similar modes of transportation services to the Postal Service" without reference to any U.S. carrier preference. Indeed, the Postal Reorganization Act repealed in the interest of postal efficiency former section 6104 of Title 39, establishing a U.S.-flag preference with respect to ocean transport of mail, and the Postal Service has acted to eliminate this preference.

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[3] The Postal Service could, for example, be required to consult with the State Department regarding postal policies in a given country and establish a reciprocal policy with regard to mail transportation to that country.

The Postal Service has departed from the policies mandated by the Postal Reoganization Act by establishing a ten percent discriminatory rate preference in favor of U.S. air carriers in the award of ISAL contracts. This 10 percent preference is passed on directly to users of the ISAL mail by the Postal Service, which estimates that over fifty percent of the ISAL rates charged to shippers are based on its air transportation costs. The Postal Service has also pursued a U.S.-flag preference policy in connection with air transportation of letter mail. It has explicitly advised Congress that it does so only because foreign carriers have charged higher rates.[4] However, in 1980 the Postal Service declined British Airways' offer to carry U.S. transatlantic mail for 10 percent less than the CAB rate charged by U.S. carriers.[5]

Obviously the American public using the international air services offered by Postal Service is not receiving the most "efficient and economical postal service." Instead it is subsidizing U.S. carriers. The Postal Service has never adequately explained its U.S.-flag preference policies in transporting the mail in view of the Congressional directives described above. And for Congress to enact legislation affirmatively directing the Postal Service to establish a discriminatory rate preference for U.S. carriers would be an inexplicable departure from the policies it established in the Postal Reorganization Act, apparently representing a simple decision to subsidize U.S. carriers at the expense of these policies.

CURRENT LAW

The House committee report, while explicitly recognizing that H.R. 5297 (as reported by the committee and passed by the House) does not change the legal requirements governing the award of mail contracts to foreign carriers, nevertheless purports to "clarify the intent" of section 405(e)(2) of the Federal Aviation Act by suggesting that it requires the Postmaster General to make a written finding of necessity that U.S. carries offer "no service or inadequate service in a market" before awarding a mail contract to a foreign carrier. House report at pp. 11-13.

Specifically, the House report opines: Ordinarily the fact that the price stated in the bid of a U.S. air carrier is higher than that stated in the bid of a foreign air carrier would not by itself be sufficient basis for a finding of inadequate service under section 405(e)(2).

There is simply no support for the view, and the House committee report cites none, in either the language or legislative history of section 405(e)(2) or elsewhere, that this provision requires a finding of necessity that U.S. carrier service is unavailable prior to award of a mail contract to a foreign air carrier. Section 405(e)[6] has nothing to do with the relationship between U.S. and foreign carrier service. It concerns exclusively, as its title states, foreign postal arrangements. Subsection (1) provides in essence that nothing in the Federal Aviation Act shall be deemed to impair the authority of the Postal Service to enter into any arrangement with a foreign postal administration for the transportation of U.S. mail by aircraft. Subsection (2) provides that where service "may be necessary" by a foreign carrier not obligated to transport the mail by a foreign country (*i.e.*, where the Postal Service has not entered into an arrangement with a foreign postal administration under subsection (1) providing for the transportation of U.S. mail), the Postal Service may make arrangements for transporting the mail directly with a foreign carrier, without advertising.

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[4] See, e.g., Testimony of Joseph F. Jones, Director-Logistics, U.S. Postal Service, before the Subcommittee on transportation and Aeronautics, House Interstate and Foreign Commerce Committee, Hearings on H.R. 14266 et al., 93d Cong., 2d Sess., Serial No. 93-90, pp. 430-31.

[5] Letter of Michael S. Coughlin, Assistant Postmaster General, Mail Processing Department dated December 5, 1980 to E. J. Moritz, British Airways' Cargo Marketing Services and Development Manager, attached hereto as Exhibit A. (The exhibits A and B were not reproducible and are in the committee file.)

[6] Section 405(e), entitled "Foreign Postal Arrangement," provides as follows:

(1) Nothing in this Act shall be deemed to abrogate or affect any arrangement made by the United States with the postal administration of any foreign country with respect to transportation of mail by aircraft, or to impair the authority of the Postmaster General to enter into any such arrangement with the postal administration of any foreign country.

(2) The Postmaster General may, in any case where service may be necessary by a person not a citizen of the United States who may not be obligated to transport the mail for a foreign country, make arrangements, without advertising, with such person for transporting mail by aircraft to or within any foreign country.

Section 405(e)(2) was adopted unchanged by the Federal Aviation Act of 1953 from the Civil Aviation Act of 1938 and has been part of U.S. law for well over forty years. It is well established that later congressional discussions of an existing statutory provision, such as the House committee's discussion of section 405(e)(2) in its report, have little or no legal significance in interpreting the provision. See, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 117–113 (1980). The House report is also, unfortunately, uninformed in that it discusses an issue concerning which the committee held no hearings and received no testimony or submissions for the record, and which was the subject of a hotly disputed formal protest before the U.S. Postal Service.[7]

There is also no support elsewhere in the Federal Aviation Act or in the provisions of Title 39, U.S. Code, establishing the Postal Service's authority to provide for the transportation of the U.S. mail, to lend credence to the house report's strained reading of section 405(e)(2). Indeed, section 405(e)(2) is not the only provision authorizing the Postal Service to contract with foreign airlines to carry the mail. Under 39 U.S.C. § 404 the Postal Service is given, "[w]ithout limitation of the generality of its powers, the "specific power" to "provide for the . . . transportation . . . of mail." Furthermore, under 39 U.S.C. § 5401(a) the Postal Service is expressly "authorized to provide for the safe and expeditious transportation of mail by aircraft." And it is authorized by 39 U.S.C. § 5401(b) to make such rules regulations or orders, consistent with the Federal Aviation Act and CAB requirements thereunder, "as may be necessary for such transportation."

These powers are clearly broad enough to authorize the Postal Service to transport the mail on foreign carriers in the absence of specific restrictions on it authority to do so elswhere in Title 39 or in regulatory requirements under the Federal Aviation Act. There are no restrictions in either statute requiring the Postal Service to prefer U.S. over foreign carriers in the transportation of mail. Neither Chapter 50 of Title 39, making general provisions for mail transportation, nor Chapter 54 of Title 39, governing transportation of mail by aircraft, contains such restrictions. And section 406(h)(1) of the Federal Aviation Act, originally enacted as section 406(h) of the Civil Aeronautics Act of 1938, specifically contemplates Postal Service arrangements with foreign carriers to transport the mail, subject only to the limitation that foreign carriers not receive a rate higher that paid by the foreign country concerned to U.S. carriers transporting its mail.

The CAB has imposed no limitations or restrictions on the ability of the Postal Service to use the services of foreign carriers to transport the U.S. mail. On the contrary, the CAB routinely grants foreign flag carriers, including British Airways, authority in their foreign air carrier permits to carry mail on their scheduled international services between the United States and other countries, thus making their services available to the Postal Service.[8]

CONCLUSION

Congress should recognize that in enacting legislation mandating a discriminatory rate preference for U.S. carriers in the transportation of U.S. mail, it would be abruptly departing from existing Congressional international aviation and postal policies and adopting a protectionist stance that would erode the credibility of U.S. aviation policy with other countries and encourage retaliation by them. It would in essence be taking the first step toward eliminating compatible policies of other countries. If Congress decides to legislative in this area, it would be far more consistent with its overall international aviation and postal policies to require the Postal Service to adopt procedures for transporting the U.S. mail to another country no more restrictive for the foreign flag carriers of that country than the policies followed by the postal administration of that country with respect to U.S. carriers.

Respectfully submitted,

J. D'A. MEREDITH,
General Manager, The Americas.

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[7] The Air Transport Association of America (ATA), on behalf of twelve U.S. airlines, protested the award of ISAL contractors to several foreign carriers, including British Airways. On May 17, 1984, the Postal Service dismissed the ATA's protest on the grounds that it was untimely. I have attached, as Exhibit B, British Airways' submision in the protest proceeding.

[8] British Airway's analysis of the Postal Service's authority to transport mail on foreign carriers under title 39 and the Federal Aviation Act is set out at greater length in exhibit B.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Washington, DC, June 21, 1984.

Hon. NANCY L. KASSEBAUM,
Chairman, Aviation Subcommittee of the Committee on Commerce, Science, and Transportation, Washington, DC

DEAR MADAME CHAIRMAN: It is my understanding that the Senate Aviation Subcommittee, on June 21, 1984, will convene hearings on proposed legislation to modify certain provisions of the Airline Deregulation Act of 1978, and to provide for an orderly transfer of remaining regulatory functions from the Civil Aeronautics Board to other federal agencies. Less than one year ago, on June 27, 1983, the International Brotherhood of Teamsters testified about these matters at some length before the Subcommittee. In our view, the concerns we expressed then are equally pertinent today.

This letter is to reemphasize certain matters of great importance to this organization and to the approximately 30,000 airline employees it represents. I also want to bring to the Subcommittee's attention a recent development that, unless remedied, may defeat Congress' intention and upset the balance it sought to achieve in deregulating the airline industry. As you know, the ADA was a product of considerable study and compromise. It was enacted over the opposition of those, including this organization, who believed firmly that the disruption caused by the necessity of adapting to a deregulated environment would cause airline employees substantial hardship.

The bankruptcies of Braniff Airways and Continental Airlines, among others, and the almost total disappearance of former National Airlines' domestic structure, are illustrative of the hardships faced by our members within the past several years. Fortunately, however, Congress included in the ADA provisions designed to mitigate those hardships.

In § 102(a)(3), the CAB was directed to take into account "the need to encourage fair wages and equitable working conditions," as a public interest factor, in fulfilling its responsibilities under the Act. At the very least, this requirement represents Congressional approval of the CAB's long-standing policy of conditioning merger approval upon the Allegheny-Mohawk Labor Protective Provisions. Also, in § 43 of the ADA, Congress enacted comprehensive hiring and monetary assistance protections for airline employees.

It is critically important to strengthen these labor protections, and to assure their continuance beyond December 31, 1984. In this regard, we are pleased that H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 11 (1984) states:

"In administering Section 408 of the Act CAB has imposed labor protective provisions, known as the Allegheny-Mohawk conditions, as a condition to its approval of many mergers and other Section 408 transactions. These conditions have been imposed in all recent mergers of carriers operating large (more than 60 seats) aircraft. The Committee expects the DOT will continue to impose labor protective conditions and to consider the interest of industry employees when evaluating the public interest under Section 102(a)(3)."

Certainly, the foregoing expression of intention is a step in the right direction. We are concerned, however, that this statement in the Committee's report does not adequately guarantee the rights of airline employees. Since the Allegheny-Mohawk conditions are of proven value in preventing labor discord, we believe that any Sunset Legislation ultimately enacted should explicitly require DOT to impose these labor protective provisions in approving mergers and other consolidations. In addition to the standard conditions, there should be an explicit requirement that merged or consolidated air carriers continue to adhere to existing collective bargaining agreements until outstanding representation issues are finally settled in accordance with the requirements of the Railway Labor Act.

On May 17, 1984, the United States District Court for the District of Columbia held that § 43 of the ADA is unconstitutional under the separation of powers doctrine because of its legislative veto provisions. *Alaska Airlines, Inc.* v. *Donovan,* Civ. No. 84-0485, D. D.C. Although the suit concerned only the preferential hiring provisions of § 43, the District Court held that the entire Employee Protection Program was invalid. This decision, if upheld, will terminate nine extensive labor protection investigations now pending before the Civil Aeronautics Board, and will end the chances for the employees of Braniff and other bankrupt air carriers to prove that their loss of employment was caused by the regulatory changes provided by the ADA. We request the Senate to reenact § 43 without its legislative veto provisions.

Finally, we ask that § 43 of the ADA be modified in two other respects. First, the preferential hiring provision should be expanded to cover carriers which have entered the industry and received certification after October 24, 1978. Second, the qualification standard for the income maintenance and compensation remedies should be modified. In particular, we urge that present § 43, 49 U.S.C.A. § 1552(h)(2), be amended by striking the bracketed words and adding the underscored language as follows:

"The term 'qualifying dislocation' means a bankruptcy or major contraction of an air carrier holding a certificate under Section 1371 of this title, occurring during the first ten (10) complete calendar years after October 24, 1978, [the major cause of] to which [is] the change in regulatory structure provided by the Airline Deregulation Act of 1978 contributed importantly, . . ."

Adoption of the foregoing recommendations will assure that Congress' intention, so clearly expressed in 1978, to mitigate the hardships suffered by industry employees during the transition to a deregulated environment will not be defeated.

Respectfully yours,

JACKIE PRESSER,
General President.

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